Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-529

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Church of Scientology of California petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, 1a-16a) is reported at 591 F.2d 533 (9th Cir. 1979). The district court opinion (App. E, 23a-83a) is unreported; its prior opinion (Appendix F, 84a-140a) also is unreported.

Jurisdiction

The judgment of the court of appeals (App. B, 17a) was entered on February 22, 1979. A petition for rehearing and suggestion of rehearing *en banc* was denied on June 6, 1979 (App. C, 19a). On August 24, 1979, Mr. Justice Rehnquist granted an order extending the time within which to file a petition for writ of certiorari to and including October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Question Presented

Whether the Church of Scientology of California may appeal from a final order of the district court denying its application under Rule 41(e) of the Federal Rules of Criminal Procedure for the return of property allegedly seized in violation of the Fourth Amendment when, during the pendency of its appeal, a grand jury in a different jurisdiction indicted eleven individuals, not the Church, on matters relating to the materials seized?

Statutes and Rules Involved

28 U.S.C. § 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Statement

1. On July 8, 1977, approximately 130 F.B.I. agents, acting pursuant to two search warrants, conducted simultaneous searches of two Los Angeles premises of the Church of Scientology of California (the Church), seizing over 48,000 documents comprising 102,000 pages. On the same date, F.B.I. agents executed an identical search warrant at the Founding Church of Scientology in Washington, D.C.

On July 12, 1977, petitioner filed a motion for return of property pursuant to Rule 41(e), F.R.Crim.P., in the United States District Court for the Central District of California. Petitioner alleged that the California search and seizure were unlawful because, *inter alia*: (1) the search warrant did not describe with particularity the premises to be searched and the items to be seized; and (2) even if the warrant was facially proper, the searching party grossly exceeded the limits of the warrant and conducted a general

search. Petitioner sought the return of its property, describing the documents seized as relating to the Church and protected by the First Amendment. Petitioner also included a request for suppression of the documents as evidence, as authorized in Rule 41(e).[1]

On July 15, 1977, the Founding Church of Scientology in Washington filed a Rule 41(e) motion in the United States District Court for the District of Columbia, challenging the Washington, D.C. search and seizure on similar grounds.

The District of Columbia case was decided first. *In re Search Warrant dated July 4, 1977,* 436 F. Supp. 689 (D. D.C. 1977). On July 27, 1977, District Judge William B. Bryant held that the Washington search warrant was facially invalid as a general warrant because it did not sufficiently identify the items to be seized. Judge Bryant ordered that the documents seized be returned to the Founding Church of Scientology and that they be suppressed as evidence.

On August 8, 1977, District Judge Malcolm Lucas, relying upon Judge Bryant's decision, issued a similar ruling with respect to the identically worded Los Angeles warrant, ordering the return of the documents seized in the California search to the petitioner.

On December 1, 1977, the United States Court of Appeals for the District of Columbia Circuit reversed Judge Bryant's decision with respect to the facial validity of the District of Columbia search warrant. *In re Search Warrant dated July 4, 1977,* 572 F.2d 321 (D.C. Cir. 1977). The

[1] Contrary to the statement in the opinion of the court of appeals, the Church did not seek suppression "on behalf of its employees" (14a).

court held that the scope of the warrant was limited by the affidavit of F.B.I. Agent Tittle, which had been submitted with the proposed warrant to the magistrate, and that, so limited, the warrant was constitutionally acceptable. The court of appeals remanded the case for further proceedings on the issues not yet adjudicated before Judge Bryant. This Court denied certiorari on March 20, 1978. *Founding Church of Scientology* v. *United States,* 435 U.S. 925.

On April 4, 1978, Judge Lucas issued a memorandum and order in the instant case in which he followed the decision of the Court of Appeals for the District of Columbia and upheld the validity of the search warrant on its face (App. F, *infra*). He rejected petitioner's contentions that the seizure of documents contravened the First Amendment, that the search warrant was issued without probable cause, that the government had executed the warrant in bad faith, that the FBI agents used excessive force in executing the warrant, and that the search and seizure were defective because many of the executing agents did not have the affidavit in support of the warrant when they carried out the search. Judge Lucas deferred consideration of the Church's challenges to the scope, duration, and physical extent of the searches.

An evidentiary hearing was convened on June 6, 1978 to consider the remaining issues. On July 5, 1978, Judge Lucas issued an opinion and order denying petitioner's request for further evidentiary hearings, dismissing the Rule 41(e) petition, upholding the validity of the California searches, and awarding costs to the government.[2]

[2] On August 24, 1979, Judge Bryant reached quite contrary conclusions concerning the search of the Founding Church of Scientology in Washington. Judge Bryant held that the searching

2. Petitioner appealed to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1291. While the appeal was pending, a grand jury in Washington, D.C. returned a twenty-eight count indictment against eleven individuals, some of whom were members of the Church and others of whom were members of other Scientology churches. The government presented some of the documents seized during the raid on the California Church's premises on July 8, 1977 to the grand jury. The government further has stated its intention to use over 200 of such documents at trial to prove its allegations against the eleven individual defendants. The Church was not named in the indictment as either a defendant or an unindicted co-conspirator.

On February 22, 1979, the Court of Appeals for the Ninth Circuit dismissed the Church's appeal from Judge Lucas' order and opinion in the Rule 41(e) proceeding. While twice acknowledging that "the matter is not free from doubt" (App. A at 5a, 15a), the court held that "the principles applied in *DiBella* v. *United States*, 369 U.S. 121, require that the appeal be dismissed" (*Id.* at 5a). The court conceded that "*DiBella* is not precisely in point" (*Id.* at 7a) because here the party seeking relief under Rule 41(e) is not the subject of a "complaint, arraignment, information, indictment [or] . . . arrest," while "in *DiBella* there was arrest, arraignment and indictment" (8a). Nevertheless, the court found that the Church cannot appeal the

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agents "illegally and unconstitutionally executed this warrant and converted their seizure of documents into a general exploratory seizure in violation of the Fourth Amendment and of 1[illegible] U.S.C. §2234." (See App. G, 141a-161a, at 158a). Judge Bryant ordered all seized documents to be returned to the Founding Church of Scientology and to be suppressed from use at any hearing or trial.

district court's ruling against it because to allow an appeal would violate "the principle . . . that an ongoing criminal proceeding is not to be interrupted by an appeal from an order denying suppression of evidence that may be used in that proceeding" (13a-14a).

The court held that because the Church had sought not only return of its property but also suppression, it could not appeal the decision of the district court denying both requests.

The court of appeals concluded by stating that "[t]here must, at some time, be a remedy available to the Church for the return of its property, if it has been unlawfully taken." The court purported to "decide nothing more" than that "the present appeal is not that remedy" (16a). It did not suggest what remedy the Church might have, or when or how it might invoke it.

Reasons for Granting the Writ

1. The opinion of the court of appeals conflicts with decisions of this Court and other circuit courts of appeals holding that a party not the subject of a pending criminal proceeding may appeal from an adverse ruling on a Rule 41(e) application for return of property allegedly seized unlawfully. *United States* v. *Ryan*, 402 U.S. 530, 533; *Cogen* v. *United States*, 278 U.S. 221, 225; *Gottone* v. *United States*, 345 F.2d 165 (10th Cir. 1965); *United States* v. *Alexander*, 428 F.2d 1169, 1171 (8th Cir. 1970); *Coury* v. *United States*, 426 F.2d 1354 (6th Cir. 1970). While considerable confusion reigns over the question of the appealability of denials of Rule 41(e) motions, *see, e.g., Shea* v. *Gabriel*, 520 F.2d 879, 880-882 (1st Cir. 1975), and cases cited therein, this is the first case to our knowledge which

subordinates the right of a litigant to recover his own property seized in violation of the First and Fourth Amendments to the government's desire to use that property in grand jury, extradition and trial proceedings against *other* persons. In addition, the issues arise in a most disturbing context—raids of unprecedented scope against a Church in which the government has seized privileged religious and attorney-client materials. As this Court stated in *DiBella* v. *United States*, 369 U.S. 121, a case involving related issues:

> Not only disagreement among the circuits but dubieties within them demand an adjudication based upon searching consideration of such conflicting and confused views regarding a problem of considerable importance in the proper administration of criminal justice.

369 U.S. at 124.

As we note above (*ante*, p. 6), the court of appeals in this case itself expressed "dubieties" about the result it reached. It acknowledged that the *DiBella* decision, on which it relied, was "not precisely in point" (7a) because *DiBella* dealt with the appellate rights of persons against whom criminal proceedings had been instituted, while no such proceedings are pending or imminent against the Church. To justify its holding, the court of appeals fastened upon the language in *DiBella* (369 U.S. at 124) that "Only if the motion [under Rule 41(e)] is solely for the return of property and is in no way tied to a criminal proceeding *in esse* against the movant can the proceeding be regarded as independent" (6a). It purported to find support for its conclusion in several opinions of other courts of appeals which "carry the *DiBella* principle

a little farther." (8a).[3] The court of appeals concluded by noting for the second time that its decision was "not free from doubt" (15a) because of this Court's decision in *United States* v. *Ryan*, where the Court stated:

> Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle. We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal prosecution pending against the movant. See *DiBella* v. *United States, supra.* [369 U.S. at 131-132]. Denial of review in such circumstances would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession.

402 U.S. at 533.

Even though its opinion left the Church totally "without any opportunity . . . to assert on appeal [its] right to possession," the court of appeals did not attempt to reconcile its holding with *Ryan*. Other courts of appeals, however, have essayed to interpret *DiBella* and *Ryan* in a consistent matter. In *United States* v. *Alexander*, 428 F.2d 1169 (8th Cir. 1970), for example, the court held that *DiBella* forbids appeal of a Rule 41(e) motion to return and to suppress only where the motion was not independent of a criminal proceeding: "When the order rendered on the [Rule 41(e)] motion *is* independent of any criminal prosecution *against the movant* it is considered 'final' within the meaning of

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[3] The court relied principally upon *Application of United States*, 427 F.2d 1140 (5th Cir. 1970); *United States* v. *Glassman*, 533 F.2d 262 (5th Cir. 1976), and its own decision in *Meier* v. *Keller*, 521 F.2d 548, 556 (9th Cir. 1976).

§ 1291." 428 F.2d at 1171. The court further held that a Rule 41(e) motion for return of property is not rendered non-appealable merely because the movant also seeks suppression, noting that this Court had declined to hold "that a motion made under Rule 41(e) gains or loses appealability simply upon whether it asks return or suppression or both." 428 F.2d at 1171, n. 3, quoting from *Carroll* v. *United States,* 354 U.S. 394, 404 n. 17.

The Sixth Circuit has analyzed the question a little differently but it, too, would allow the Church to appeal in the instant case. It has held that that part of a Rule 41(e) motion which seeks *suppression* is not appealable under *DiBella,* but that that portion of the motion which seeks return of the property is and must be appealable under *DiBella* and *Ryan* if the party seeking return of the property is not the subject of pending criminal proceedings. *Coury* v. *United States,* 426 F.2d 1354 (6th Cir. 1970); *United States* v. *Williams,* 459 F.2d 909 (6th Cir. 1972).

The First Circuit, while not resolving the question finally, has indicated its agreement with the Sixth Circuit's approach. *Shea* v. *Gabriel,* 520 F.2d 879 (1st Cir. 1975). In *Shea,* the court canvassed the confusing and conflicting attempts by the various circuits to decide the question in light of *DiBella* and *Ryan.* It noted that to deny a party against whom a criminal proceeding had not been instituted the right to appeal from an order denying its motion for return of property would contradict the clear statement in *Ryan* that such a party must have the right to appeal. It stated the sensible view that it would "exalt form over substance" as well as overburden the federal courts to insist that such a party file a separate motion for return of property in order to preserve its right to appeal that issue. And it aligned itself with at least the Sixth, Eighth and

Tenth Circuits in insisting that a criminal proceeding is not *in esse* against a movant until "the criminal process shifts from the investigatory phase to the accusatory." 520 F.2d at 882.

While other courts have disagreed on the precise circumstances under which a Rule 41(e) motion may be appealed, no case until the court of appeals decision in this case explicitly denied a party not subject to a pending criminal proceeding an opportunity to appeal. In *Parrish* v. *United States,*[4] *Smith* v. *United States,*[5] *Austin* v. *United States,*[6] *Meier* v. *Keller,*[7] and *United States* v. *Glassman,*[8] indictments were returned against the moving party before the decisions denying appealability were rendered by the courts of appeals. In each such case, the court recognized that an appeal would be allowed if no criminal proceedings were pending against the party seeking appeal. Indeed, the Ninth Circuit itself so held until the panel's decision in the instant case. *VonderAhe* v. *Howland,* 588 F.2d 364, 368 (9th Cir. 1975), and cases cited therein.

The court of appeals below placed greatest reliance upon *Application of United States,* 427 F.2d 1140 (5th Cir. 1970), which denied appealability after an indictment had been returned. Nothing in the opinion in that case indicated that any of the appellants were not the subject of a criminal proceeding. Language in *United States* v. *Glassman, supra,* which was decided six years later, indicated that three of the appellants in *Application of United States* were not indicted, although they apparently were targets of an on-

[4] 376 F.2d 601 (4th Cir. 1967).

[5] 377 F.2d 739 (3rd Cir. 1967).

[6] 521 F.2d 548 (9th Cir. 1975).

[7] 353 F.2d 512 (4th Cir. 1967).

[8] 533 F.2d 262 (5th Cir. 1976).

going grand jury investigation. Even if so, there was no indication that the court in *Application* was aware of that fact or analyzed its importance. The decision, as interpreted by *Glassman* and reinterpreted by the court below, hardly is persuasive authority for disregarding this Court's clear statement in *Ryan,* as applied by the other circuits.

2. The court of appeals' decision creates a dangerous loophole by which the government can immunize itself from any judicial review whatsoever of even the most flagrantly unlawful search and seizure. All the government need do is indict third parties with no privacy interest in the documents seized or the premises searched. The third parties will not have standing to move to suppress, and under the court of appeals' decision below, the parties whose rights were violated will be powerless to seek return of their property once a criminal proceeding is instituted.

It is precisely to protect against such a result that Rule 41(e) itself provides, in terms, for the termination of a separate proceeding for the return of property *only* where the movant himself becomes the subject of an indictment. The clear intent of the provision is to preserve the rights of an unindicted person to seek and obtain return of his property if it was unlawfully seized. The court of appeals' decision undermines the scheme of the Rule which ensures that all violations of Fourth Amendment rights may be quickly corrected.

CONCLUSION

The court of appeals decision reached an untenable result in conflict with the mandates of this Court's decisions. It creates further confusion in an area of the law which already is unsettled. Resolution of the problem is critical to the proper administration of criminal justice, just as it was in the *DiBella* case.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1979

Affidavit of Service

I hereby certifiy that on September 28, 1979, I caused three copies of the foregoing Petition for a Writ of Certiorari to be served by first class mail, postage prepaid, upon the Office of The Solicitor General, U.S. Department of Justice, 10th and Constitution Avenue, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Dated: New York, N. Y.
September 28, 1979

LOUIS MARK

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1981

Appendices

APPENDIX A

OPINION of the COURT

of APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHURCH OF SCIENTOLOGY OF CALIFORNIA,	)
Petitioner-Appellant,	)
vs.	)
UNITED STATES OF AMERICA,	)
Respondent-Apellee.	)

No. 78-2434

OPINION

Appeal from the United States District Court for the Central District of California

Before: DUNIWAY and CHOY, Circuit Judges, and SOLOMON,* District Judge

*The Honorable Gus. J. Solomon, Senior

DUNIWAY, Circuit Judge

The Church of Scientology of California appeals from a judgment denying its application under Rule 41(e), F.R. Crim. P., for the return of property seized under certain search warrants and for the suppression of the evidence seized. We conclude that we do not have jurisdiction, and dismiss the appeal.

On July 7, 1977, two search warrants were obtained authorizing search of certain offices of the Church, located in two buildings that it owns in Los Angeles. A similar warrant was obtained for a search of part of a building owned by the Founding Church of Scientology in Washington, D.C. The affidavits in support of the warrants were substantially identical, and so were the warrants, except for descriptions of the premises to be searched. There was a separate warrant for each place to be searched. The warrants were executed

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United States District Judge for the District of Oregon, sitting by designation.

simultaneously at 9:00 a.m. Washington time, and at 6:00 a.m. Los Angeles time. Many files were examined at each place, in an effort to find the papers listed in 161 separate paragraphs of the warrants, and in paragraph 162 of each, which reads:

> Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S. Code §§371, 1503 and 641 of which facts recited in the accompanying affidavit make out.

The Church asserts that more than 20,000 documents were seized. Motions to recover the seized documents were filed on July 12, 1977, in the District Court for the Central District of California, and on July 15, 1977, in the District Court for the District of Columbia. In the District of Columbia, the District Court granted the Church's motion. The Court of Appeals reversed. See In re Search Warrant dated July 4, 1977, D.D.C., 1977, 436 F.Supp. 689; Id., D.C. Cir., 1977, 572 F.2d 321, cert. denied, sub nom Founding Church of

Scientology v. United States, 435 U.S. 925 (1978).

Throughout the proceedings in the District Court in the case at bar, the Church has made it clear that the principal reason for its motion has been and is to prevent the use of any of the seized papers for the purpose of obtaining indictments against either the Church or its officials or employees. A grand jury in the District of Columbia had been considering the offenses mentioned in the affidavits supporting the search warrants - conspiracy to steal government property, conspiracy to obstruct justice, theft of government property, and obstruction of justice. Many of the seized documents have been presented to that grand jury, both before and during the proceedings in this case. Since this case began, and on August 15, 1978, the District of Columbia grand jury has indicted 11 persons, at least some of them officials or employees of the Church. So far as we are advised, however, the Church has not been indicted.

Under orders of the District Court, the government has supplied the Church with two sets of copies of all documents seized, except for certain ones that, according to the government, are its

property and are of a sensitive or confidential character.

Although the matter is not free from doubt, we conclude that the principles applied in DiBella v. United States, 1963, 369 U.S. 121, require that the appeal be dismissed. There, two persons were involved. One, DiBella, had been arrested under a warrant, and he was arraigned and released on bail. Some evidence was seized when he was arrested. He moved to suppress the seized evidence. While the motion was pending, he was indicted. The motion to suppress was denied, and he appealed. The other person, Koenig, had been arrested in Florida on the basis of a complaint charging bank robbery in Ohio. He filed a proceeding in the federal court in Florida, to suppress seized property, while removal proceedings were pending. Meanwhile, Koenig had been indicted in Ohio. Thereafter, the Florida District Court granted suppression but denied return of the property. Koenig appealed from the denial of his motion for return of his property. The Supreme Court held that neither order was appealable.

The Court's holding is stated as

follows:

> We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. Presentations before a United States Commissioner [citation omitted] as well as before a grand jury [citation omitted] are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or an arraignment, information or indictment -- in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." [Citation omitted.] Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in ease against the movant can the proceeding be regarded as independent.
> Id. at 131-32 (emphasis added).

The Court also disposed of another argument that could be made for appealability in this case, that this case was decided by a District Court in California, where the seizure occurred, while the criminal proceeding is in the District of Columbia.

> An alternative ground for appealability in the Koenig case, likewise culled from dicta in some of our decisions, would assign independence to the suppression order because rendered in a different district from that of the trial. Id at 132.
>
> * * *
>
> Rule 41(e), of course, specifically provides for making of the motion in the district of seizure. On a summary hearing, however, the ruling there is likely always to be tentative. We think it accords most satisfactorily with sound administration of the Rules to treat such rulings as interlocutory.
> Id at 132-33.

We recognize that DiBella is not precisely in point. While the grand jury had been investigating the Church,

there has been no complaint, arraignment, information or indictment against it, nor any arrest. In DiBella there was arrest, arraignment, and indictment; in Koenig there was a complaint, an arrest, and an indictment.

Later cases, however, carry the DiBella principle a little farther. In Application of United States, 5 Cir. 1970, 427 F.2d 1140, this was the court's holding, concerning motions to suppress filed before any indictments were returned.

> 2. The appellants' motions in the court below included a demand for the return of property, but the Court in DiBella held that "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent." (Emphasis supplied.) 369 U.S. at 131, 132, 82 S.Ct. at 660. As regards the appellants Dudley, the three Sklaroffs, Blott and Richmond, who are now under indictment for violations of Title 18, U.S.C., their motion to suppress is an integral part of criminal proceedings in esse the denial of which is non-appealable at this time. In a like manner, the motion to suppress of

> appellants Rogers, Wittell and Green is nonappealable for the motion is not solely for the return of property, in conformity to the DiBella rule, but primarily seeks suppression of evidence from grand juries in criminal proceedings. DiBella v. United States, supra at 131, 132, 82 S.Ct. at 660, 661.

Subsequent language in the opinion can be read to indicate that the last three persons mentioned were also indicted. However, in United States v. Glassman, 5 Cir., 1976, 533 F.2d 262, the court tells us that this was not so.

> The order [of the district court] denying this motion was dated September 12, 1975; appellant apparently was never detained. So according to the literal language of DiBella there was no criminal prosecution in esse at the time this appeal was brought. But in Application of United States . . . three of the appellants were not indicted by the grand jury, and yet the court found that their Rule 41(e) motion was made primarily to suppress evidence from the anticipated grand jury hearings and therefore was not made "solely for

> return of property" as DiBella requires. . . .
> Id at 263.

Both Glassman and Application of United States, and especially the latter, support dismissal of the appeal that is before us.

Our decision in Meier v. Keller, 9 Cir., 1975, 521 F.2d 548, 556, cert. denied, 424 U.S. 943 (1976), is also persuasive.

> The denial of a preindictment motion or comparable relief is an interlocutory nonappealable order unless "the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant." DiBella . . . Meier's appeal meets neither criterion for appealability. His complaint sought suppression as well as return. . . . [T]here was already a criminal prosecution in esse because presentment had been made to the Nevada grand jury at the time the complaint [for Rule 41(e) relief] was filed [in the Central District of California]. Thus, the appeal should be dismissed for want of jurisdiction in this court.

In Parrish v. United States

4 Cir., 1967, 376 F.2d 601, the plaintiffs sought, under Rule 41(e) return of records obtained from them by Internal Revenue agents, allegedly by fraud, and their suppression as evidence. Relief was denied, and they appealed. At that time, so far as appears, there was no indictment and no other criminal proceeding pending (p. 602). Later, they were indicted. On the authority of DiBella, supra, the appeal was dismissed. Judge Boreman would have gone further and held the order not appealable even if there had been no indictment (pp. 603-04).

In Smith v. United States, 3 Cir., 1967, 377 F.2d 739, Smith and his wife petitioned for an injunction prohibiting the presentation of certain evidence to a grand jury, prohibiting its use in prosecuting the petitioners, and requiring return of the evidence. The petitioning husband and wife had produced the records relating to their income at the request of the Internal Revenue Service. When their action was filed, they had not been indicted. While their petition was under submission, they were indicted for income tax evasion. Nine days later, their petition was denied. The court held that the denial was not appealable, citing

DiBella, supra, despite the fact that the petitioners had not been indicted when they filed their petition. The rationale was that the petition was not solely for the return of property; it sought to enjoin use of the evidence looking toward proseuction; it was tied to an incipient criminal proceeding (p. 742).

Austin v. United States, 4 Cir., 1962, 333 F.2d 512, is similar to Smith v. United States, supra, that an order denying a petition to have suppressed. in advance of indictment, documents that petitioner claimed the I.R.S. had obtained from her by fraud (see Austin v. United States, 4 Cir., 1961, 297 F.2d 359), was not appealable.

Our decision in Goodman v. United States, 9 Cir., 1966, 369 F.2d 166, is different. There, as we said, "there is, and has been, no criminal proceeding in any stage." (p. 168.) Not so in the case at bar.

In Cobbledick v. United States, 1940, 309 U.S. 323, the Court held that an order denying a motion to quash a subpoena duces tecum to appear and produce documents before a grand jury is not appealable. Part of the rationale was that it would be undesirable to permit a witness, by appealing, to halt an

ongoing criminal proceeding. Thus, he cannot appeal, even though he could not appeal from the final decision in the criminal case because he is not a party to it (p. 326). See also Alexander v. United States, 1906, 201 U.S. 117.

United States v. Ryan, 1971, 402 U.S. 530, is similar. As Mr. Justice Brennan said:

> Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle. We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal proseuction pending against the movant. see DiBella v. United States, supra, [369 U.S. at] at 131-132. Denial of review in such circumstances would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession.

The principle that runs through all of these authorities is that an ongoing criminal proceeding is not to be

interrupted by an appeal from an order denying suppression of evidence that may be used in that proceeding. This is such a case. There was, and so far as the record shows, there is an ongoing proceeding before at least one grand jury, in the District of Columbia. The parties tell us that there is, or was, another proceeding before a Federal grand jury in New York. There is also a proceeding pending in Great Britain to extradite two of the persons indicted by the District of Columbia grand jury, and some of the seized papers are being used in that proceeding.

The petition or motion here did not and does not seek only the return of the property. It expressly seeks suppression of evidence, and is avowedly aimed at suppressing evidence in grand jury, extradition, and other criminal proceedings.

Moreover, suppression in this case is sought by the Church on behalf of its employees as well as on its own behalf. Some or all of those employees may not have standing to seek suppression. Suppression at the behest of the Church would be an abuse of Rule 41(e), and is an additional reason to deny appealability.

Similarly, suppression of evidence that is to be presented to the grand jury is sought, although the government would have the right, under the decision in United States v. Calandra, 1974, 414 U.S. 338, to use the evidence before the grand jury as the basis of questions to a witness, even though the evidence may have been obtained in violation of the Fourth Amendment. Zurcher v. Stanford Daily, 1978, 436 U.S. 547, holds that, upon a proper showing of probable cause, a warrant may issue authorizing a search of the premises of an innocent third party for evidence of crime. Usually, the criminal would have no standing to suppress such evidence. Yet, if a denial of a motion by the third party for return of the evidence and to suppress it were appealable, presentation of the case against the criminal to a grand jury could be delayed for long periods of time. Surely, if the evidence can be obtained, it can also be retained during the progress of the criminal proceeding. Yet it is retention that the Church seeks to terminate here.

Our decision that the order appealed from is not appealable is not free from doubt, for the reasons states by Mr. Justice Brennan in United States v. Ryan,

supra. There must, at some time, be a remedy available to the Church for the return of its property, if it has been unlawfully taken. But the present appeal is not that remedy. We decide nothing more.

Appeal dismissed.

APPENDIX B

JUDGMENT of the

COURT of APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHURCH OF SCIENTOLOGY OF CALIFORNIA,	)
Petitioner-Appellant,	)
vs.	)
UNITED STATES OF AMERICA,	)
Respondent-Appellee.	)

No. 78-2434

Appeal from the United States District Court for the Central District of California

JUDGMENT

This case came on to be heard on the

transcript of the record from the United States District Court for the Central District of California, and was duly submitted.

On CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this court that the appeal be and hereby is dismissed.

Judgment Filed and
Entered February 22,
1979.

APPENDIX C

ORDER of the COURT of

APPEALS DENYING PETITION

for REHEARING and SUGGESTION

of a REHEARING en banc

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 78-2434

ORDER

Before: DUNIWAY and CHOY, Circuit Judges, and SOLOMON,* District Judge

*The Honorable Gus. J. Solomon, Senior

The petition for a rehearing is denied. The suggestion of a rehearing in banc has been submitted to all of the active judges of this court in regular active service. No judge of the court or of the panel that decided this case has called for a vote upon the suggestion of a rehearing in banc. The suggestion of a rehearing in banc is rejected.

United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D

JUDGMENT of the DISTRICT COURT
(July 5, 1978)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 78-2434

JUDGMENT

This action came on for hearing before the Court, Honorable Malcolm M. Lucas, District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT in accordance with the Court's Memorandum and Order, dated April 4, 1978 and the Memorandum of Decision, dated July 5, 1978 that Petitioner's Application for the Return of Property Seized Pursuant to Search Warrant be dismissed on the merits with prejudice, that the Petitioner take nothing, and that Respondent, United States of America, recover of the Petitioner, Church of Scientology of California, its costs of action.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, a copy of this Judgement on counsel for the parties in this matter.

Dated: July 5, 1978

Malcolm M. Lucas

APPENDIX E

OPINION of the
DISTRICT COURT
(July 5, 1978)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Petitioner,	)
v.	)
UNITED STATES OF AMERICA, Respondent.	)

NO. CV-77-2565-MML

MEMORANDUM OF DECISION

This Court conducted evidentiary hearings during the trial week beginning on Tuesday, June 6, and continuing through Friday, June 9, 1978, on the remaining issues[1/] presented by Petitioner's appli-

cation for the return of property seized by F.B.I. agents. Oral argument by counsel on the questions presented was heard on Monday, June 12, 1978, and at the close of these hearings, the Court took the questions presented under submission. This Memorandum of Decision will resolve those questions.

I

INTRODUCTION

This is an action, pursuant to Fed. R.Crim.P. 41(e),[2] by the Church of Scientology of California for the return and suppression of material seized from its premises by F.B.I. agents.

On July 8, 1977, F.B.I. agents, acting pursuant to two warrants,[3] conducted simultaneous searches of two Los Angeles premises of the Church of Scientology of California and seized property therefrom. The two Los Angeles premises

searched are known as the Fifield Manor[4] and the Cedars-Sinai Complex.[5] In the course of both Los Angeles searches, the F.B.I. agents seized approximately 20,000 documents which are said to number approximately 90,000 pages. In addition, the F.B.I. agents seized several items of property other than documents.

Contemporaneous with the Los Angeles searches and seizures, F.B.I. agents conducted a search of premises and seizure of documents from the Founding Church of Scientology in Washington D.C. The search and seizure in Washington D.C. is the subject ot a separate action, pursuant to Fed.R.Crim.P. 41(e), in the District of Columbia District Court.[6] In re Search Warrant dated July 4, 1977 for Premises at 2125 S. Street, Northwest, Washington D.C., (Misc. 77-0151).

The Los Angeles searches were conducted pursuant to warrants issued by Magistrate Penne. These warrants were issued on the basis of the affidavit of

F.B.I. Agent Robert Tittle, who in turn relied upon information supplied by Michael J. Meisner, who until late in 1976 was the National Secretary of the Church. As related by Agent Tittle, Meisner alleges that on three occasions he and Gerald Bennett Wolfe, also a member of the Church, entered the U.S. Courthouse in the District of Columbia an unlawfully entered the offices of the United States Attorney. Meisner and Wolfe used false I.R.S. credentials to gain initial entry into the U.S. Courthouse, according to the affidavit, and did so for the purpose of stealing documents concerning the Church of Scientology from the office of an Assistant U.S. Attorney. According to the affidavit, these surrepititious entries into the office of the U.S. Attorney in Washington D.C. were made to carry out official programs of the Church of Scientology which called for the infiltration of government agencies and the elimination

of individuals considered by the Church to be "enemies."

The origin, nature and implementation of these programs is described in detail in the affidavit. As a part of these programs, Church members were placed in government jobs with access to sensitive documents and they then copied documents for use by the Church.[7/] The offices of a number of government agencies other than the U.S. Attorney's office were illegally entered, and documents were subsequently copied. Thus, set forth in detail in the affidavit is a sizable conspiracy among Meisner, Wolfe, and a number of other Church officials to steal government documents.

The affidavit also describes the events following the apprehension of Meisner and Wolfe in the U.S. Courthouse in Washington D.C. Various Church officials responded to this event by seeking to fabricate exculpatory grand jury testimony and to suborn perjury. Thus,

the affidavit also describes in detail a conspiracy to obstruct justice.

Almost immediately after this action was commenced, the Court ordered the Government to prepare a copy of the seized documents and provide them to the Petitioner so as to enable Petitioner to prepare fully its application for the return of the seized property. As the Petitioner has a copy of the documents,[8] the principal purpose of this action is to determine whether the Government will be free to use the documents in possible future criminal proceedings.

II

ISSUES PREVIOUSLY CONSIDERED

Considerable confusion appears to exist as to the precise issues presently before the Court. Accordingly, before considering the issues properly brought before the Court, clarification is in

order. At the cost of some repetition, another review of the procedural history of this case is needed to distinguish the issues proviously resolved by the Court from issues presently before the Court.[9]

Prior to this Court's ruling upon the issues presented by Petitioner's application for the return of seized property, District Judge Bryant of the District of Columbia ruled that the search warrant, which authorized the search of the Washington D.C. premises of the Church of Scientology, was a "general warrant," and hence, constitutional impermissable. In re Search Warrant dated July 4, 1977 for Premises at 2125 S. Street, Northwest, Washington D.C., 436 F.Supp. 689 (D.D.C. 1977). Judge Bryant based his decision upon a finding that item 162 of the search warrant's 162 items or categories of things to be seized was so broad that it failed the Fourth Amendment's requirement

of specifity. Id.

The collateral estoppel effect of Judge Bryant's decision upon the issues raised in this forum was then briefed by the parties and orally argued. At the close of a hearing on this question, this Court ruled that the principle of collateral estoppel precluded further litigation between the parties concerning the legality of the warrant in view of the identity of the parties and the nearly identical warrants in question. Accordingly, this Court found the Government was bound in this forum by Judge Bryant's determination that the warrant did not meet the requirements of the Fourth Amendment.

The Government appealed Judge Bryant's decision to the Court of Appeals of the District of Columbia. The Court of Appeals reversed and held that the warrant was facially proper. The Court found that:

> "the district court gave an overbroad construction to the search warrant, improperly interpreted the revelant offenses, ignored a significant part of item 162 and gave an unduly restrictive interpretation to the Supreme Court decision in Andresen v. Maryland, supra."

In re Search Warrant dated July 4, 1977 for Premises at 2125 S. Street, Northwest, Washington D.C., __F.2d__ (D.C.Cir. December 1, 1977) at 4.

Based upon the Court of Appeals' decision, the Government sought reconsideration by this Court of its prior ruling. Accordingly, this Court invited the Court of Appeals for the Ninth Circuit to remand this case back to this Court for reconsideration. Order from Bench, December 21, 1977, see, e.g., Canadian Ingersol-Rand Co. v. Peterson Products of San Mateo, Inc., 35 F.2d 18 (9th Cir. 1965). The Court of Appeals responded to this Court's invitation by remanding this case back to this Court

on March 7, 1978.

Upon remand of this case, this Court sought to expedite resolution of the Petitioner's challenge to the legality of the searches and seizures. To that end, on March 9, 1978, the Court issued an order directing the parties to file status reports. After receipt of these reports, the Court issued its "Order Setting Hearing on Rule 41(e) Motion", which established March 30, 1978 as the hearing date on Petitioners's Fed.R.Crim. P. 41 (e) application. With respect to the issues to be considered, the Court said:

> "At that time [March 30, 1978], the Court intends to consider all <u>legal</u> and <u>factual</u> issues presented by petitioner's Fed.R.Crim. 41(e) motion."

<u>Order Setting Hearing on Rule 41(e) Motion</u> at 1 (emphasis is original). By stipulation between the parties, approved by the Court, the parties agreed that:

> "petitioner's challenge to the seizure of particular individual documents during the execution of the two challenged Los Angeles search warrants [will] be held during the week of May 15, 1978."

Stipulation, dated March 30, 1978.

On March 30 and March 31, 1978 the Court conducted two days of evidentiary hearings on all legal and factual issues presented by Petitioner's Rule 41(e) motion aside from the reserved issue. At those hearings, the Court considered the following legal issues:

(1) Are the warrants facially proper? (and the collateral estoppel affect of the decision by the Court of Appeals for the District of Columbia).

(2) Did the issuance of the warrants contravene the First Amdnement?

(3) Was there probable cause for the issuance of the warrants?

(4) Were the warrants obtained in bad faith, and, if so, were they therfore improper?

(5) Did the agents violate Section 3109, 18 U.S.C. §3109, in executing the warrants?

(6) Did the F.B.I. agents violate Fed.R.Crim.P. 41(d) in executing the searches and seizures? and

(7) Did the agents executing the warrants have in their possession the affidavit upon which the warrants were issued? And, if not, did this make the searches illegal?

At that time, the Court considered the Government's contention that, on the authority of United States v. Calandra, 414 U.S. 338 (1973), it was entitled to immediate use of the seized material before a grand jury. These issues were considered and decided by the Court in its Memorandum and Order, dated April 4, 1978.

The issue of whether the F.B.I. agents who conducted the search seized documents outside the scope of the warrants, which was reserved and continued

by the Stipulation, supra, was ultimately set for hearing on June 6, 1978. The hearing date was set by an agreement between the parties which was placed upon the record at a hearing on April 21, 1978. At the April 21, 1978 hearing, the parties reaffirmed their agreement that the only remaining issue to be presented to the Court in this matter was whether the F.B.I. agents exceeded the scope of the warrant. Reporter's Transcript of Proceedings, April 21, 1978. Accordingly, the only issue which appeared to be appropriate for consideration at the June 6, 1978 hearing was whether the agents exceeded the warrant. The reserved issue, in turn, comprises two distinct sub-issues: (a) did the F.B.I. agents seize documents from areas not covered by the warrants, and (b) were certain seized documents not within the warrants' specific descriptions of the items to be seized?

Petitioner apparently decided for

its own reasons not to proceed upon either of these two sub-issues. At the evidentiary hearings conducted by this Court during the week of June 6 through June 9, Petitioner did not introduce any of the seized documents, or any other evidence, to prove either that documents were seized from areas outside the areas described in the warrant or that seized documents were not included in the list of property to be seized. Instead, Petitioner abandoned its prior contentions and unveiled a completely new theory. As discussed more fully below, Petitioner's present contention is that the F.B.I. agents improperly conducted the searches and seizures because they failed to minimize the intrusion. As this theory was not presented in Petitioner's lengthy Brief in Support of Motion to Return and Suppress Because of Illegality in Execution of Warrants (herein "Brief in Support"), or in Petitioner's Reply Brief in Support of Motion

to Return and Suppress Property Because of Illegality in Execution of Warrants (herein "Reply Brief"), the Court gave Petitioner leave to file and additional trial brief setting forth its present theory.

In addition to setting forth this new theory that the F.B.I. agents failed to minimize the intrusion, Petitioner's Trial Brief, filed after four days of evidentiary hearings, includes a "request [for] a hearing to consider the legality of the seizure of each individual document." Trial Brief, at 19 fn. 2. Petitioner's request must, obviously, be denied. As set forth above, the issue of the legality of the seizure of particular documents was originally set for hearing as part of the March 30, 1978 hearing and was continued, by stipulation, as an accommodation to the parties. At a hearing on April 21, 1978, the matter was set for hearing on June 6. However, at the June 6 hearings, Petitioner elec-

ted not to introduce any of the seized documents and thereby to abandon its contention that particular documents were illegally seized. Petitioner has been afforded numerous and ample opportunities to present its contention that individual documents were illegally seized;[10] it will not be heard to raise this abandoned issue once again. Accordingly, its request for a hearing on this issue is denied.

Although Petitioner's present argument concerning the manner of execution was not specifically reserved in the parties' Stipulation, supra, and is, therefore, arguably barred by this Court's "Order Setting Hearing on the 41(e) Motion," the Court will nonetheless consider Petitioner's contention that the searches and seizures were conducted in an overly intrusive manner. The Court will consider this new contention only because it is related to Petitioner's prior contention that the searches and

seizures were conducted in an exploratory manner. Absent this relation, it is clear that the Government would be unfairly prejudiced by consideration of this issue.[11]

Finally, before considering Petitioner's present contentions, the Court notes that numerous issues previously considered by the Court at the March 30 March 31 hearings, and determined in the Court's Memorandum and Order, are raised again in Petitioner's Brief in Support and in Petitioner's Reply Brief.[12] The arguments addressed to these previously considered issues have been reconsidered, but the Court is not persuaded to modify its prior rulings embodied in its Memorandum and Order.

With this review in mind, the Court can turn to Petitioner's present contentions.

III

PETITIONER'S ARGUMENT

As set forth in its Trial Brief and its final oral argument, Petitioner challenges the execution of the warrants on the ground that F.B.I. agents who conducted the searches and seizures in question read and seized sensitive documents of the Church of Scientology in an improper and needlessly obtrusive manner. According to Petitioner, in executing the warrants, the F.B.I. agents should have sought to locate certain particular files of Church and then confined their search to these files. Instead, says Petitioner, the agents attempted and to a large extent succeeded in searching all files, desks and closets where documents were stored. Petitioner argues that based upon information supplied by informant Michael Meisner, the agents could have confined their searches narrowly. Instead, says Petitioner, the

agents rummaged through and examined as many documents as time permitted. Petitioner agrues that under the circumstances of searches of property belonging to a church,[13] and documents said to be presumptively protected by the First Amendment, the searches were impermissably broad.

Petitioner argues that executing the warrants the F.B.I. agents transformed specific warrants into general warrants. Thus, according to Petitioner, the original ruling by Judge Bryant that the warrant was on its face a "general warrant" was a correct depiction of the manner in which the agents actually executed the warrant. Moreover, Petitioner argues that although the affidavit and warrant may be specific on its face, as found by the Court of Appeals, the execution of the search and seizure was not in accordance with the warrant and affidavit.

Specifically, Petitioner contends

that in carrying out the searches, the F.B.I. agents should have first searched out the files referred to by the Church as the "program", "operation" and "government special bank" files for the documents listed in the warrant. Only after the agents had scrutinized these files should the agents have searched the "main files." Thus, according to Petitioner, based upon the information supplied by the informant Meisner, the F.B.I. agents could have, and should have, minimized the intrusion. Instead, says Petitioner, the agents rummaged everywhere. Thus, according to Petitioner, the searches and seizures were "unreasonable," and therefore violated the Fourth Amendment.

IV

FOURTH AMENDMENT ANALYSIS

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court summarized the two distinct purposes served by the requirment of a warrant for a

search and seizure. There the Court said:

> "First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. . . . The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. See, e.g., Boyd v. United States, 116 U.S., at 624-630, 6 S.Ct., at 528-532; Marron v. United States, 275 U.S. 192, 195-196, 48 S.Ct. 74, 75-76, 72 L.Ed. 231; Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed. 2d 431."

Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), quoted with approval, Andresen v. Maryland, __U.S.__, 96 S.Ct. 2745, 2748 (1976). Thus, in Coolidge, the Court reiterated the concern that a

search and seizure be conducted so as to minimize the intrusion. The Court then proceeded to explain:

> "The warrant accomplishes this second objective [of minimizing the intrusion] by requiring a 'particular description' of the things to be seized."

Coolidge v. New Hampshire, supra, 403 U.S. at 746. In addition to requiring a "particular description" of the things to be seized, the Warrant Clause of the Fourth Amendment requires the warrant "particularly [to] describ[e] the place to be searched." U.S. Constitution, Amend IV. Thus, as recognized by the Court in Coolidge, the Warrant Clause insures that the intrusion caused by a search is minimized by requiring a particularized description of the things to be seized and the places to be searched. With these familiar tenets of Fourth Amendment jurisprudence in mind, attention may be turned to the Petitioner's

argument that the searches were not executed in the least intrusive manner possible.

Both of the warrants here in question included an identical eight page list of 162 different specific items to be seized. In addition, each of the warrants here in question included a specific description of the places to be searched. The warrant for the Fifield Manor search had the following description of the place to be searched:

> "Fifield Manor, 5930 West Franklin Avenue, Hollywood, California, more particularly on so much of the premises below as consists of the suite of offices of Mr. Hemming Heldt located at 5930 West Franklin Avenue, Hollywood, California, a seven story victorian building originally used as a hotel, known as 'Fifield Manor,' with entrance at the Franklin address as well as 1840 Tamarind Avenue. . . . "

The warrant for the search at Cedar-Sinai included the following description:

> "Cedar-Sinai Complex, 4833 Fountain Avenue, Hollywood, California, and more particularly on the first floor area housing the offices occupied by the Deputy Guardian for Information and his staff and personnel, in the premises described below. . "

Petitioner's contention that an exploratory search ocurred puts in issue whether the F.B.I. agents who executed the warrant searched in places other than those designated in the warrants.

The consistent and uncontradicted testimony of the F.B.I. agents who searched at Fifield Manor showed that the agents did not search or seize any property outside the areas set forth in the Fifield warrant. As directed by the warrant, the agents confined their searches to the warrant's description of the places to be searched, the suite of offices occupied by Henning Heldt. Petitioner has not come forward with any evidence to support its contention that executing the warrant at the Fifield

Manor, the agents searched or seized property outside of Heldt's suite of offices.

Petitioner's assertion that the F.B.I. agents also searched an area designated by it as the "Con-Comm" room does not show that the agents searched outside the warrant's description of the place to be searched. There is no evidence in the record to show that the room designated as "Con-Comm" was not a part of the suite of offices occupied by Henning Heldt. In fact, the testimony of F.B.I. agents who searched at Fifield strongly suggests that the area designated by the Petitioner as the "Con-Comm" room was in fact part of Henning Heldt's suite of offices. The Court's own review of a map supplied by Petitioner of the sixth floor of the Fifield Manor building strongly supports the view that the room designated by Petitioner as the "Con-Comm" room is in fact part of the suite of offices of Henning Heldt. Peti-

tioner also suggests that the F.B.I. agents also searched and seized documents from a telex room on the sixth floor. Again, there is no evidence that the telex room, which adjoins Heldt's office, is not within Heldt's suite of offices. Moreover, no evidence whatsoever has been presented to show that documents were taken from the telex room.

The evidence concerning execution of the warrants at the Cedars-Sinai Complex likewise shows that, nearly without exception, the F.B.I. agents properly limited their search to the warrant's description of places to be searched. The testimony of agents who searched at Cedars showed that the search and seizure was limited to the place to be searched, "the first floor area housing the offices occupied by the Deputy Guardian for Information and his staff and personnel..."

Various agents testified that they entered the Cedars-Sinai Complex at approximately 6:00 A.M. and conducted a

preliminary review of the premises and sought entry into locked rooms on the first floor. At that time the agents did not know the exact location of the area housing the offices of the Deputy Guardian for Information. Based upon the affidavit and briefing, see infra, the agents knew, however, that this complex of offices could be identified by the fact that it contained a group of 250 file cabinets. Accordingly, after securing the premises, the agents sought to locate these offices by finding the area housing this group of 250 file cabinets. The agents' efforts to locate the offices of the Deputy Guardian were hampered by the fact that a substantial group of offices on the first floor, which later were revealed to be the offices of the Deputy Guardian, were not identified and were locked. Requests that both the outer and the inner locked doors to these offices be opened were never met, and the agents waited for

approximately two hours before gaining access to this complex of offices forcibly.[14/] Prior to gaining entrance, the agents entered a room designated by Petitioner as the "Action" room and another room directly across from the area which was later revealed to be the Deputy Guardian's complex. Based upon the presence of extensive file cabinets, the agents believed that these two rooms might well have been the offices they were seeking and they commenced a search in these rooms.

The testimony of Agent Noyes to the effect that upon entry into the building a preliminary search team walked through various floors of the building does not show, as Petitioner contends, that the agents conducted an exploratory search throughout the premises. It shows, at most, that a small group of agents reasonably and properly sought to secure the premises so as to assure their saftey and so as to prevent the destruction of evi-

dence. There is no evidence whatsoever that during this initial review of the premises, the preliminary search team, or any other agents, examined any documents or seized anything. This initial examamination of the premises, if in fact a search, cannot by any stretch of the imagination be characterized as an exploratory search or a general rummaging.

In addition to challenging the initial review of the premises, Petitioner asserts that the record shows that F.B.I. agents searched two offices on the ground floor not within the warrant's designation of the place to be searched. The two offices said to be outside the place to be searched, the complex of offices of the Deputy Guardian for Information, were both on the first floor and proximate to the place to be searched. One of these two offices, described as the "Action" office, was at the end of the first floor corridor which leads away from the entrance. The other office was

located directly across the complex of offices of the Deputy Guardian for Information.

Although the agents may have searched in an area outside the warrant's description of the place to be searched, this does not invalidate the search and and seizure at Cedars-Sinai Complex. The agents' conduct in searching areas arguably outside those designated in the warrant was, under the circumstances, reasonable. At the outset of the search, agents properly sought to locate the place to be searched. Believing that the proper place to be searched had been located, the agents, acting reasonably and in good faith, searched two rooms which were both on the first floor and extremely proximate to what was later revealed to be the Offices of the Deputy Guardian. The search and seizure of property in these two rooms does not prove an exploratory rummaging or a general search. In the context of a

search of a multi floored building with hundreds of rooms, the agents' apparently inadvertant entry and initial search of these two rooms does not invalidate the entire search and seizure of the Cedars-Sinai Complex.

It is unclear from the testimony presented whether the F.B.I. agents continued their search of either of these two rooms after the discovery of the primary location of the complex of offices occupied by the Deputy Guardian for Information. The record can be read to suggest that the agents did continue the search of the "Action" room after discovery of the Guardian's complex of offices and that this room is not within the place designated in the warrant to be searched. Also implicit in the record is the suggestion that the search continued because, during the initial search, the agents discovered items included in the warrant's list of property to be seized or other evidence

of crimes. On this record, it is not clear if the "Action" room was within "first floor area housing the offices occupied by the Deputy Guardian for Information and his staff and personnel." Search Warrant. Further, assuming that the "Action" office was not within the complex of offices of the Deputy Guardian for Information and his staff and personnel, it is not possible to ascertain when and if the agents learned this. The agents might reasonably have concluded that the "Action" room was part of the offices of the staff or personnel of the Deputy Guardian for Information or an adjunct thereto, in light of the fact that the main complex of offices of the Deputy Guardian for Information did not contain the full 250 files mentioned in the affidavit of Agent Tittle. This evidence, even when viewed in light most favorable to Petitioner, simply does not establish that the F.B.I. agents conducted an exploratory search.

Assuming that the search and seizure in these two rooms did continue after the Deputy Guardian's office was discovered, and further assuming that the continued search was illegal, the proper remedy is only suppression of the documents and other materials seized therein. See, e.g., United States v. Daniels, 521 F. 2d 665 (9th Cir. 1977). Thus, even if the continued search of this room was illegal, Petitioner would be entitled only to the return of the documents seized therein.[15/] However, inasmuch as Petitioner has not brought forward any evidence of whether any documents seized were taken before or after the place to be searched had been located, the Court need not, and will not, resolve the question whether documents seized from the "Action" room must be suppressed.

Having considered the question of whether the agents exceeded the warrant by searching and seizing outside the

areas designated by the warrant, the Court must now examine the manner of the execution of the warrant.

The testimony of the agents revealed that on July 7, 1977, the day before the searches, the F.B.I. agents were briefed for a full day on all subjects touching on their execution of the warrants. During the morning, the agents were briefed by the two Assistant U.S. Attorneys heading this investigation about the nature of the investigation, the religious nature of the places to be searched, and the search warrants which they were to execute. Thereafter, each of the agents received a copy of the affidavit and warrant, and were given a period of time to read and study it. The briefing recommenced thereafter and at this time, the agents' questions concerning the warrant and investigation were answered. Thereafter, the agents were divided into two groups and briefed separately about the searches and seizures at the Fifield Manor and at the Cedars-Sinai Complex. Still later, the agents were further sub-divided into small search teams and further instructions were given concerning the execution of the warrants. A number of agents testified that they took their copies of the affidavit and warrant home and studied them further in preparation for the next day's search.

At both the Fifield Manor and the Cedars-Sinai Complex premises, the agents had readily available legal guidance and direction in the execution of the warrants. At the Cedars-Sinai Complex, one of the Assistant U.S. Attorneys in charge of the ongoing investigation accompanied the agents so as to provide readily available legal advice concerning the execution of the warrant. In addition, an F.B.I. Agent who is also an attorney at law was also present to assist the searching agents and to answer their questions. At Fifield Manor, the other

Assistant U.S. Attorney handling the investigation was present, as was another F.B.I. Agent who is also an attorney at law. As noted, agents were instructed at the briefings that the places to be searched were premises of a Church, that the utmost in professionalism was required, and that they should avoid entry into and searching of particular religious rooms such as chapels. These instructions were carried out scrupulously. The testimony also revealed that the agents had the warrant and affidavit with them as they conducted the seizure.16/

In its Trial Brief and oral agrument, Petitioner placed its nearly complete reliance upon the contention that the F.B.I. agents executed the search in a needlessly obtrusive and constitutionally impermissably manner because the agents did not initially examine the "program," "operation", and "government special bank" files before proceeding to

examine the "main files." This argument is, quite simply, untenable.

Even were the Court to accept Petitioner's contention that there is an additional requirement that agents conduct a search in the most limited manner that hindsight can provide, the facts strongly undercut Petitioner's suggested course of search. Petitioner's theory that the agents should have first searched the "program", "operation", and "government special bank" files, and then proceeded to examine the "main files" only if the enumerated items to be seized had not been found, ignores the fact that the items to be seized were documents and that there were multiple copies of many of these documents allegedly distributed to several officers in the Church. Thus, for example, even assuming that the agents confined their initial search to the "program" files and in the "program" files found one of each of the Particularly enumerated documents in the

them to have searched those files. Thus, under the circumstances, the main files would, inevitably, have had been searched.

Petitioner's proposed method of conducting the search is beset by further problems. Based upon the affidavit underlying the warrant, there was reason to believe that the items to be seized would be found in the "main files" as well as in the "program," "operations," and "government special bank" files. Moreover, a seriatim examination of the files, as suggested by Petitioner, would have required substantially more time than the procedure employed of simultaneous searches of the four sets of files. Accordingly, Petitioner's proposal would have made the searches more intrusive, not less. Still further, it may well have been impossible for the agents to have identified the particular files that they were searching so as to permit a search in the manner suggested by Peti-

warrant, the agents would still not have known that all the copies of the documents to be seized had, in fact, been seized.

Moreover, even if this problem could somehow have been overcome, there would still be the problem presented by some of the items in the list of 162 items to be seized. A few of the 162 categories of items to be seized provide for seizure not of particular documents, but of categories of documents or other evidence of certain crimes. Even if the agents had searched the "program", "operation" and "government special bank" files first and checked off what had been seized on the list of items to be seized, the agents would still not have been able to determine whether items to be seized were still to be found in the "main files." The only possible way for the agents to have determined whether the "main files" contained any of the items to be seized would have been for

tioner.

Petitioner has cited a number of cases stemming from wiretap interceptions of telephone conversations in support of its contention that the searches in this case failed to "minimization" requirement. See, e.g., United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973) cert. denied 141 U.S. 866 (1973). The statutory requirement that a wiretap "be conducted in such a way as to minimize the interception of communication not otherwise subject to interceptions[s]. . . " requires that under all of the circumstances the interceptions were reasonable. Scott v. United States, __ U.S.__, 98 S.Ct. 1717 (1978). Assuming arguendo that the statutory requirement of minimization of wiretap interceptions applies to the searches of the type herein, see, Andresen v. Maryland, supra, 96 S.Ct. at 2749, fn. 11, the conclusion is inescapable that the searches were, under the circumstances, conducted in a

manner which minimized the intrusion. In sum, the argument that the agents failed to minimize the search by first looking at the "program," "operation," and "government special bank" files, does not withstand analysis.

Finally, Petitioner's contention that the agents read through hundreds of thousands of pages presumptively protected by the First Amendment, and perhaps by the evidentiary privileges of priest-penitent and attorney-client, hardly merits serious contention. Initially, petitioner did not introduce the documents or any other evidence whatsoever to support the claim that the documents siezed or examined contained privileged communications. Moreover, Petitioner has still not come forward with any factual demonstration of the interests embodied in the documents which are said to be protected by the First Amendment. Putting aside these deficiencies, Petitioner's contention

comes aground upon very recent authority. In Zurcher v. The Standford Daily,____ U.S.____,May 31, 1978, the Supreme Court declined to impose an additional requirement upon a search either because it was directed at a third party or because it was directed to an institution protected by the First Amendment. Because of Justice Stweart's dissent, the Court was well-aware that a search for documents and papers always carries with it the danger of an examination of numerous documents which are not subject to seizure.

Thus, he wrote:

> "The Court says that 'if the requirements of specificity and reasonableness are properly applied, policed, and observed' there will be no opportunity for the police to 'rummage at large in newspaper files.' Ante, at 17. But in order to find a particular document, no matter how specifically it is identified in the warramt, the police will have to search every place where it might be -- including, presumably, every file in the office --

> and to examine each document they find to see if it is the correct one. I thus fail to see how the Fourth Amendment would provide an effective limit to these searches."

Under Zurcher, and examination of numerous documents other than those to be seized does not invalidate the warrant. See also, Andresen v. Maryland,__U.S.__, 96 S.Ct. 2737 (1976) (search of numerous documents subject to attorney-client privilege to locate incriminating documents is constitutionally permissable).

Lastly, based upon all of the evidence presented to the Court, the Court finds that the searches and seizures at Fifield Manor and Cedars-Sinai Complex, even though directed at a church, were reasonable and properly limited under the circumstances. Petitioner has completely failed to demonstrate that the searches and seizures in question were improper in any way.

Having considered Petitioner's arguments in plenary fashions, and having

concluded that Petitioner is not entitled to any relief by this action, the Court hereby dismieses with Prejudice Petitioner's Application for the Return of Property. Further, restrictions imposed by prior orders of Court upon the use by the Government of property seized are hereby vacated.[17] Still further, the Court hereby grants judgment in favor of the Respondent.

Petitioner has sought numerous stays of the Court's Memorandum and Order, dated April 4, 1978.[18] Immediately after the Opinion was issued, this Court granted Petitioner a twenty-four hour stay of that Memorandum and Order to permit Petitioner to seek immediate review. Thereafter, the Court of Appeals for the Ninth Circuit, upon review of the Court's Memorandum and Order, denied a motion by Petitioner for a further stay. Further motions for stays were repeatedly made by Petitioner in this matter, and have been rejected by this Court. Ac-

cordingly, the Court has considered in advance of the issuance of this Memorandum of Decision the question of whether its mandate should be stayed. Although granting a stay will occasion still a further delay of pending grand jury proceedings which have been stalled by this proceedings for a full year, see also, United States v. Calandra, 414 U.S. 388 (1973), nonetheless, upon careful consideration, the Court has determined that a twenty-four hour stay would be appropriate under the circumstances to permit Petitioner to seek appellate review. This stay is, of course, granted upon the same condition as was the April 4, 1978 stay; namely, Petitioner agrees that it will notify Respondent so that Respondent may be present at any proceedings before the Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, a

copy of this Memorandum of Decision, on counsel for the parties of this matter.

Dated: July 5, 1978

Malcolm M. Lucas
United States District Judge

FOOTNOTES

1/ As discussed more fully in Section II of this Memorandum of Decision, infra, numerous issues presented by Petitioner's Fed.R.Crim.P. 41(e) application were previously considered and resolved by this Court in its Memorandum and Order, dated April 4, 1978. As the present Memorandum of Decision can best be understood in conjunction with the April 4, 1978 Memorandum and Order, a copy of that opinion is attached hereto as an appendix.

2/ Rule 41(e) actions must be dismissed unless the moving party makes a showing that irreparable injury will result unless granted the relief requested. Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974), cert. denied 420 U.S. 927 (1975) cited with approval in G.M. Leasing Corp. v. United States, __U.S.__,97 S.Ct. 619

(1977). See also Order re F.B.I. Internal Memoranda, dated September 9, 1977. The Court finds that the Church has made the requisite showing of irreparable injury in this case.

3/ The warrants here in question are numbered 77-1028M and 77-1029M.

4/ The Fifield Manor, located at 5930 West Franklin Avenue, Hollywood, California was formerly a hotel, and is presently used by the Church as both a business office and as living quarters.

5/ The Cedars-Sinai Complex, located at 4833 Fountain Avenue, Los Angeles, California, was formerly used as a hospital and occupies approximately a city block.

6/ The propriety of the search in the District of Columbia is, of course,

not before this Court.

7/ These assertions are, of course, based only upon F.B.I. Agent Tittle's affidavit. For reasons of style, the phrase "according to the affidavit" has been omitted in some places.

8/ Subsequent to issuance by the Court of it Memorandum and Order, dated April 4, 1978, Petitioner sought another copy of the seized document based on the contention that the first set provided by the Government had been destroyed by church officials. Although there appeared no lawful justification for the alleged destruction, the Court ordered the Government to provide the Petitioner with another copy of the documents to expedite these proceedings.

9/ For a detailed description of the procedural history of this case, see

the Court's Memorandum and Order, dated April 4, 1978. See also, Order Re F.B.I. Internal Memoranda, dated September 9, 1977.

10/ On Monday, June 5, 1978, Petitioner sought a continuance of the heargins scheduled to commence the next day the ground that it had not had sufficient time to review the documents. As Petitioner had not demonstrated valid grounds for the continuance, the Court denied the Application. In part, the Application for Continuance was denied upon the fact that Petitioner represented that it had spent, 3530 hours reviewing the documents -- strongly countervailing the assertion that it had not had a sufficient opportunity to review the documents. When the hearings commenced the next morning, Petitioner's counsel brought approximately 25 notebooks of documents, said to be

arragned according to seizing agent and in various other categories. After some time was spent during the morning of Wednesday, June 7, 1978, in and effort to mark these notebooks for identification, Transcrpit of Proceedings, at 222-5, these documents were never introduced. Accordingly, Petitioner's conduct undercuts its assertion that it was unable to review its documents which the Government seized from it.

11/ Petitioner has had approximately eleven counsel of record in these proceedings. Regretably, during the last two months, this action had been marked by a number of stipulations unfulfilled by Petitioner's counsel. Petitioner's trial counsel sought to justify these defalcations by recourse to the number of, and changes in, Petitioner's counsel of record in this action. A party is, of

course, bound by stipulations entered into by its counsel of record, past and present.

12/ In its Brief in Support and Reply Brief, Petitioner repeatedly makes twp assertions which merit discussion. First, Petitioner characterizes this Court's Memorandum and Order, dated April 4, 1978, as adopting a "formalistic approach," which is said to be inconsistent with the Supreme Court's recent decision in Zurcher v. The Stanford Daily, __U.S.__ (Slip Opinion May 31, 1978). Petitioner's contention is a serious distortion of the Court's analysis and a misreading of Zurcher.

In the Memorandum and Order, the First Amendment issues presented were whether the warrants were illegal based solely upon the First Amendment, or whether the First Amendment required a pre-seizure adversary hearing or

post-seizure institution by the Government of adversary proceedings. See, e.g., Marcus v. Search Warrants of Property, etc., 367 U.S. 717 (1961); Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). In that opinion, the Court noted that Petitioner had failed to make clear what First Amendment interests were implicated, and the Court then distinguished the situation here presented from those cases involving a search and seizure based upon the ideas contained or expressed in the seized materials. Memorandum and Order at 5-9. Zurcher, supra, upon which Petitioner places its greatest reliance, does not support its contention that a pre-seizure or post-seizure adversary hearing was required under the circumstances of this case. To the contrary, Zurcher reinforces this Court's conclusion and stands for the proposition that rigid adherence to

the requirements of the Fourth Amendmend adequately safeguards the First Amendment interests implicated by searches and seizures directed at institutions presumptively protected by the First Amendment interests implicated by searches and seizures directed at institutions presumptively protected by the First Amendment.

Secondly, Petitioner continuously asserts that it has been deprived of discovery in these proceedings. On April 5, 1978, this Court heard Respondent's Motion to Quash Subpoenas and for a Protective Order. At the close of that hearing, the Court granted Respondent's Motion to Quash the Subpoenas and for a Protective Order. At least four different reasons existed for that conclusion, including: (1) absence of any authority for permitting discovery in a Fed.R.Crim.P. 41(e) proceeding; (2) the collateral estoppel effect of

orders from the District Court for the District of Columbia quashing subpoenas and granting protective orders; (3) the Court's conclusion that the particular subpoenas in question were issued to harrass; and (4) the percieved interference of discovery with proceedings before a grand jury which was set to expire on April 12, 1978; see United States v. Calandra, 414 U.S. 338 (1973). At any rate, the conclusion of the hearing, the Court stated:

> "The petitioner may at a later date file a motion including the appropriate citations to take discovery in this Rule 41(e) proceeding."

Reporter's Transcript of Proceedings, April 5, 1978.

As Petitioner has never filed the motion which the Court invited, it will not be heard to assert that it has been improperly denied discovery in these proceedings.

13/ That the Petitioner, the "Church of Scientology of California," is a Church has never been questioned by the Government in these proceedings and is accepted by the Court.

14/ The evidence presented at these hearings strongly reinforces the Court's prior determination that the F.B.I. agents did not violated Section 3109 in executing the searches. Memorandum and Order, dated April 4, 1978, at 15-17.

15/ The Court's conclusion not to determine whether to suppress any documents seized from the two rooms said to be outside the warrant's description of the place to be searched is buttressed by the fact that the Government has indicated its intention, at the hearing on April 21, 1978 to return a number of unneeded seized documents to Petitioner. Accordingly,

a determination of whether particular documents were illegally seized from these two rooms, if any, may never be required because these documents may well be among the documents to be returned. Petitioner agreed at that April 21 hearing that only those non-return documents would be properly the subject of the hearing, but determined not to proceed by presenting particular non-return documents said to be illegally seized. The Government has, of course, noted that by returning some of the documents it is not conceding that these documents were illegally seized.

16/ This evidence reinforces the Court's prior conclusion concerning the presence of the affidavit at the search premises. Memorandum and Order, dated April 4, 1978, at 19-20. There, the Court found that the agents who conducted the search did have the

affidavit accompanying the warrant with them at the time of the search.

17/ The Court will not, of course, review sets of documents previously submitted by Respondent for review prior to presentation to the grand jury which have not as yet been reviewed. See also, fn. 18.

18/ The Court's April 4, 1978 Memorandum and Order permitted the Government to use, before the grand jury, documents which were seized pursuant to items 1-161 in the warrant's designation of property to be seized. Petitioner's motion to the Court of Appeals for the Ninth Circuit for a stay of this Court's Memorandum and Order was denied upon the condition that none of the documents be presented to the grand jury until they were first presented to this Court to assure that the documents were with-

in this Court's Memorandum and Order. Order, dated April 6, 1978, Court of Appeals for the Ninth Circuit. In accordance with the Order by the the Court of Appeals for the Ninth Circuit, this Court has conducted an in camera review of documents to be submitted to the grand jury. The documents submitted by Respondent, as well as the Court's orders respecting these documents, were placed under protective seal.

Petitioner has repeatedly challenged the Court's in camera review of documents, asserting, inter-alia, that the procedure employed interfered with its preparation of these Rule 41(e) proceedings and otherwise prejudiced it. Petitioner's contention is altogether specious. Petitioner has no right to know what evidence is to be presented to the grand jury; there is no pre-indictment discovery. See also, United States v.

Calandra, 414 U.S. 338 (1973). Moreover, this information is completely irrelevant to whether the searches and seizures were legal, and if not, whether the material seized should be returned to Petitioner. Fed.R. Crim.P. 41(e).

Petitioner's depiction of the procedure as "ex parte" and its contention that some of the documents submitted to the grand jury were not proper is equally specious. In the first place, the documents were simply submitted to the Court without either party being present or participating in the in camera review. The assertion that documents not within the purview of this Court's April 4, 1978 Order were being submitted to the grand jury is particularly vexing. First, to be in a position to make this assertion, Petitioner's counsel had to ignore Court orders placing the documents

submitted by Respondent under seal, and thereby, to take advantage of an error in the Clerk's office. Such conduct is inexcusable. Moreover, Petitioner's assertion that improper documents were being submitted to the grand jury ignores the fact that this Court examined the documents submitted and ruled, in Orders placed under seal, that some of the documents submitted did not in fact correspond, and could not therefore be used before the grand jury at that time.

APPENDIX F

OPINION of the DISTRICT COURT

(April 4, 1978)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

NO. CV-77-2565-MML

MEMORANDUM AND ORDER

The Church of Scientology of California has brought this action, pursuant to Fed.R.Crim.P. 41(e),[1] for the return of numerous documents seized by F.B.I. agents on July 8, 1977 from Church pre-

mises located in Los Angeles and described by the parties as the Cedars-Sinai Complex[2] and the Fifield Manor.[3] Simultaneously, another search of Church property and seizure of documents occurred in Washington D.C. The search of Washington D.C. premises is the subject of a separate Fed.R.Crim.P. 41(e) proceeding before Judge Bryant of the District Court for the District of Columbia.[4] In re Search Warrant Dated July 4, 1977 for Premises at 2125 S Street, Northwest, Washington D. C., Misc. 77-0151.

The searches and seizures at both Los Angeles premises,[5] which were executed by F.B.I. agents acting pursuant to a warrant which had been approved by U.S. Magistrate Penne, are challenged by petitioner on numerous grounds which are reviewed seriatum below.

A. PROCEDURAL HISTORY

A short review[6] of the tangled history of this case is in order. Prior to the hearing on the merits in this forum,

Judge Bryant of the District of Columbia held, in a Memorandum and Order dated July 27, 1977, that the search warrant in question was a "general warrant," and hence constitutionally infirm. Accordingly, this Court raised the issue of the collateral estoppel effect of Judge Bryant's ruling of the issues presented in this forum, and held a hearing on August 8, 1977 to consider this question. At the close of the hearing, this Court concluded that the principle of collateral estoppel precluded further litigation concerning the legality of the warrant in view of the identity of the parties to both proceedings and the nearly identical warrants in both seizures. On August 8, 1977, this Court issued an Order, modeled upon the Order of Judge Bryant of the District of Columbia, which required the return of the seized property to the Church.

The Court's Order of August 8, 1977, although patterned after that of Judge Bryant, was the subject of a number of

disputes between the parties which they aired, and in part, resolved at hearings held on August 12, August 18, and August 29, 1977. The resolutions of all but one of these disputes was embodied in a written stipulation, in the form of an Order, which was approved by the Court on August 24, 1977. The remaining issue, the use by the F.B.I. of certain internal F.B.I. memoranda containing information garnered from the documents held to have been seized illegally, was resolved, after a full hearing and receipt of written memoranda, by an Order issued by the Court on September 9, 1977. The Orders of August 8, August 24 and September 9, 1977 were the subject of a Final Judgment, issued on September 12, 1977 from which an appeal was taken to the Court of Appeals for the Ninth Circuit.

On December 1, 1977, the Court of Appeals for the District of Columbia reversed the decision of Judge Bryant and remanded the case to the district court for further proceedings in accordance

with the Court's directive. Immediately after the Court of Appeals for the District of Columbia Circuit issued its ruling, the Church sought and obtained a stay. The Church sought further review of Judge Bryant's decision, either by way of en banc consideration by the Court of Appeals, or hearing by the Supreme Court. Both courts subsequently rejected further appellate review of Judge Bryant's decision. At this juncture all further appellate proceedings have been exhausted and the Court of Appeals for the District of Columbia has issued its final mandate to the district court.

Upon the reversal of Judge Bryant's decision by the Court of Appeals for the District of Columbia Circuit, this Court invited the Court of Appeals for the Ninth Circuit to remand this case for reconsideration. Order from Bench, December 21, 1977; see, e.g., Canadian Ingersoll-Rand Co. v. Peterson Products of San Mateo, Inc., 350 F.2d 18 (9th Cir.

1965). At that time, the Court, recognizing the possibility of further appellate proceedings and consequent stays of of the mandate, indicated its intention to delay any reconsideration until the appellate process was completed. On March 7, 1978, the Court of Appeals for the Ninth Circuit responded to this Court's invitation by remanding this case to the Court.

To facilitate further proceedings in this matter, the Court issued an Order on March 9, 1978 which directed the parties to file status reports concerning the posture of the litigation in this forum, the posture of related litigation in the federal courts in Washington, D.C., and appropriate scheduling of the remaining issues in this litigation. The status report filed by the Government indicated the need for an expedited hearing due to the presently set expiration date of April 12, 1978 for the grand jury which had been investigating the alleged violations of the law. Concurrently, the

Supreme Court denied petitioner's application for a writ of certiorari and thereby culminated appellate proceedings. Accordingly, the Court set the matter for hearing on Thursday, March 30, 1978. At the hearing, the Court intended to consider all remaining legal and factual issues raised by petitioner's motion pursuant to Rule 41(e). The parties sought, however, to continue the hearing on the issue of the alleged excessiveness of the search and its exploratory nature, because preparation of this issue would require extensive access and familiarity with the documents. Accordingly, the Court approved a stipulation between the parties which continued the Court's consideration of this issue until a later date. 7/ Accordingly, evidentiary hearings were held on Thursday and Friday, March 30 and 31, and at the close of the hearing, the Court took the questions presented under submission. This Memorandum and Order will resolve the issues presented at these hearings.

B. ANALYSIS

I. Collateral Estoppel Effect of the Decision by D. C. Circuit Court of Appeals

The very same considerations which mandated the application of the principle of collateral estoppel to the decision of Judge Bryant apply to the decision of the Court of Appeals for the District of Columbia Circuit. Accordingly, this Court is bound by the decision of the Court of Appeals regarding the validity of the warrant. The Court must therefore hold that warrant is not a "general warrant," and consequently, this challenge leveled by petitioner must be rejected. The Court would also indicate that, were it not bound by the principle of collateral estoppel, it would hold based upon an independent review of the content of the affidavit supporting the search warrant and the warrant, that the warrant is facially proper on the authority of Andresen v. Maryland, ___U.S.___, 96 S. Ct. 2737

(1976). To the extent that the Court's Orders of August 8 and 24, 1977 are to the contrary, they are vacated by this Order.

II. First Amendment Considerations

Petitioner challenges the facial validity of the warrant [8] and the procedure by which it was obtained on the ground that, even assuming that the warrant did not contravene the Fourth Amendment, it violated the First Amendment. Petitioner's First Amendment theory is, unfortunately, not precisely clear. There would appear to be a substantial ambiguity as to whether petitioner claims to be entitled to the protection of the First Amendment because: (1) documents were seized, and hence freedom of expression is allegedly implicated, or (2) material was seized from a Church, and hence freedom of religion is allegedly implicated. Assuming that the petitioner seeks the haven of the First Amendment under both theories, the Court

does not believe that the First Amendment requires invalidation of the search and seizure.

(a) Seizure of Documents

As early as 1921, the Supreme Court recognized that:

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant."

Gouled v. United States, 255 U.S. 298, 309 (1921) quoted in Andresen v. Maryland, supra, 96 S. Ct. at 2745 (1976)(Emphasis added). Thereafter, in Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court put to rest the limitation of seizures to the fruits and instrumentalities of crime, as distinguished from "mere evidence." In abandoning the mere evidence rule which underlay the Gouled decision, the Court in Warden v. Hayden reserved

the question of "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. 387 U.S. at 302-3.

The question of whether documents are of such a nature as to preclude them from being the object of a search and seizure, reserved in Warden v. Hayden, was specifically answered in Andresen v. Maryland, supra, where the Court held that the seizure of the private business records of an attorney did not violate either the Fourth or Fifth Amendment. The Court there noted that:

> "[A] contrary determination would prohibit the admission of evidence traditionally used in criminal cases and traditionally admissible despite the Fifth Amendment. For example, it would bar the admission of an accused's gambling records in a prosecution for gambling; a note given temporarily to a bank teller during a robbery and subsequently seized in the accused's automobile or home in a prosecution for bank robbery; and incriminating notes prepared, but not sent, by an accused in a kidnapping or black-

> mail prosecution."

Andresen v. State of Maryland, 96 S. Ct. at 2746-47 (1976).

The same considerations would appear to apply to this case. Government documents, and Church memoranda describing an alleged conspiracy to steal such documents, would likewise appear to be properly subject to a search irrespective of the fact that the seized material is documents. Petitioner has cited and the Court is aware of, no authority for the proposition that documents are entitled to immunity from seizure under the auspices of a proper warrant because of the First Amendment. The absence of such authority is not surprising in light of the text of the First Amendment, which reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, ..."

The First Amendment itself says nothing

about protecting documents per se; instead, the Amendment only relates to laws which impinge upon the exercise of freedom of speech, religion, press or assembly.

Petitioner places the greatest emphasis upon the argument that, in the context of First Amendment values, a search warrant should be issued only after there is an adversary hearing. In support of its position, petitioner cites Marcus v. Search Warrants of Property, etc., 367 U.S. 717 (1961); Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Heller v. New York, 413 U.S. 433 (1973); see also, Roaden v. Kentucky, 413 U.S. 496 (1976). These cases are, however, simply inapposite.

Each of the cited cases presents the fundamentally different situation of a seizure of allegedly obscene books. The First Amendment is thus directly implicated, because the law under which the books are seized regulates their content. The case before this Court pre-

sents a different situation. The laws under which the documents were seized do not purport to regulate in any way the content or the ideas expressed in the document -- the laws simply prohibit conspiracy, theft of government property, and obstruction of justice.

Moreover, the imposition of a requirement of an adversary hearing prior to issuance of a warrant would be ludicrous in the present context. Various church officials are alleged in the affidavit to have stolen sensitive government documents. To insist upon an adversary hearing prior to seizure in this context would invite the possibility of the destruction of the evidence. Requiring such a procedure would be equivalent to requiring an adversary hearing prior to the search and seizure of narcotics -- little evidence would be likely to survive such a procedure.

In short, this is not a case where the constitutional requirement that warrants must particularly describe the

"things to be seized" is to be accorded the most scrupulous exactitude [because] the 'things' are books, and the basis for their seizure is the ideas which they contain." Stanford v. Texas, 379 U.S. 476, 485 (1965). The documents seized by the Government appear to be irrelevant to the exercise by the Church of its right of freedom of expression: they are merely evidence of crimes.

Accordingly, to the extent that petitioner contends that the search and seizure was illegal on First Amendment grounds because documents were seized, the contention must be rejected.

(b) Seizure of Material from Church

Alternatively, petitioner may be invoking the protections of the First Amendment because the search and seizure occurred on the premises of a church. Petitioner has not, however, cited any authority for the proposition that a search and seizure is subject to special procedures because it occurs on the premises of a church. The closest

analogy available would appear to be the case of a search directed at the premises of another institution protected by the First Amendment such as a newspaper. That was the situation in Stanford Daily v. Surcher, 353 F. Supp. 124 (N.D. Cal. 1972) aff'd on opinion below, 550 F. 2d 664 (9th Cir. 1977), cert. granted, ___U.S.___, 98 S. Ct. 52 (1978). Recognizing the overwhelming threat posed by a search of a newspaper office to the press' ability to gather and disseminate the news, and the availability of the "less drastic means" of subpoena duces tecum to obtain the same information, the Court in Zurcher concluded that a "third party" search of a newspaper office is impermissible in all but a few situations. 353 F. Supp. at 135.

Assuming arguendo that Zurcher does apply when the search is directed at the premises of a church rather than a newspaper, there remains a fundamental difference between that case and the present

situation. Zurcher presented a third-party search; that is, the newspaper and its members were not suspects. The search was directed at the newspaper simply to obtain evidence of the alleged crimes of others. In this case, the affidavit of Agent Tittle, based upon information from former Church official Meisner, relates facts sufficient to establish probable cause to believe that various Church personnel violated the criminal laws of the United States and that evidence of such violations was on Church premises.

Petitioner would have this Court hold that the First Amendment requires an adversary hearing prior to the issuance of a search warrant for execution at the premises of a church where probable cause exists to believe that criminal offenses have been committed and the evidence is located at a church. To state this proposition is to refute it.

For the reasons stated, petitioner's various First Amendment arguments

must be rejected.

III. Probable Cause

Petitioner challenges the finding of probable cause by the magistrate in three respects. First, petitioner asserts that much of the information related in the Affidavit of Agent Tittle and supplied by the informant, Michael James Meisner, is information not based upon the informant's personal knowledge, but rather was received by the informant from other parties. Petitioner asserts that this information relating to the location of the material to be seized is hearsay upon hearsay. Instead, says petitioner, the affidavit should have presented to the magistrate the indicia of credibility of these other parties upon whom the informant relied, so that the magistrate could judge their reliability. Secondly, petitioner contends that the informant's knowledge as to the location of the material was stale. Thirdly, petitioner argues that, although the affidavit presented to the magistrate may have sup-

plied probable cause as to some of the documents, it did not supply the requisite probable cause as to all of the documents enumerated in the warrant.

As the search and seizure in this case occurred pursuant to a warrant, signed by the magistrate after his review, the starting point of the Court's analysis of the affidavit in United States v. Vantresca, 380 U.S. 102 (1965). After reviewing past decisions concerning searches made pursuant to a warrant, the Court noted:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted

> under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

380 U.S. at 108. The Court proceeded to explain:

> "Where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States, supra, 362 U.S. at 270, 80 S.Ct., at 735."

380 U.S. at 109. The teaching of Vantresca was not disturbed in Spinnelli v.

United States, 393 U.S. 410 (1969) or in United States v. Harris, 403 U.S. 573 (1971). With these basic principles in mind, the specific challenges of the petitioner may be considered.

All of petitioner's probable cause objections stem from the sort of hyper-technical, rather than commonsense, reading of the affidavit which was disapproved in Ventresca. The Affidavit of Agent Tittle, based upon Meisner's information, supplied a surfeit of probable cause. The numerous indicia of reliability of Meisner's information is detailed in many footnotes. Moreover, Meisner's testimony, against his penal interest, is detailed and specific.

Petitioner's first objection, that the affidavit did not present the indicia of reliability of the persons upon whom Meisner relied, is absolutely without merit. Meisner's own testimony furnished more than an adequate basis for a finding of probable cause to believe that a crime

had been committed, and that the evidence was in the places designated by the warrant. As to the information respecting the location of documents, Meisner's own testimony as a former high church official was more than adequate -- even if some of it was not based upon personal observation. Moreover, Meisner's mailing of the documents to specific locations corroborates his knowledge of their location. Still further, the affidavit details the names of persons upon whom Meisner relies in determining the location of the documents. Taken in its entirety, the affidavit more than adequately meets the requisite standard of probable cause -- not proof beyond a reasonable doubt.

Petitioner's second probable cause argument -- that Meisner's information was stale -- must likewise be rejected. The information about the location of the documents was, at most, two months old. While the passage of two months

might well make information stale concerning the location of stolen vehicles or a small quantity of contraband drugs, it does not make stale information about the location of massive files kept in the course of ordinary business operations. There is, simply, no merit to the Church's staleness agrument.

Thirdly, petitioner argues that Agent Tittle's Affidavit does not furnish probable cause as to some of the documents listed in the warrant. Petitioner particularly points to Items 100-149, 157, 159, 160 and 162 as not having sufficient factual support in the affidavit to justify their seizure. Based upon the Court's careful review of the Affidavit in terms of each of the enumerated items, the Court finds that seizure of these particular documents was fully justified by probable cause.

IV.

BAD FAITH

As another separate ground for invalidation of the warrant the Church of Scientology argues that "[i]t is well established by case law that a challenge may be made against a subpoena on the ground that it is issued in bad faith." Petitioner's First Supplemental Trial Brief at 12. The Church charges that "[t]here is substantial indication of bad faith in the procurement and execution of the search warrants when viewed in the context of the Government's twenty-year campaign to destroy this Church." Id. at 1. Moreover, in oral agrument, counsel for the Church maintained that upon a prima facie showing by the Church of "bad faith," the Government should be precluded from making any use of the documents until after the Church has had an opportunity to conduct discovery and thereafter to prove its allegations of

bad faith. Counsel further asserted that such a showing had been made in this case, and that the Government seized documents without any intention of seeking criminal prosecutions but solely for the illegitimate purposes of harassing the Church. Petitioner's challenge to the warrant on grounds of "bad faith" must be rejected for the reasons that follow.[9/]

As noted previously, there was abundant evidence to support the magistrate's conclusion that probable cause existed sufficiently to justify issuance of the warrants. Informant Meisner furnished Agent Tittle with specific and comprehensive information for an investigation of possible serious criminal conduct. See supra.

Against this backdrop of an apparently legitimate investigation of serious crimes, and the issuance of a warrant upon an affidavit relating extensive, detailed information of specific criminal

activity, the Church's evidence to support its contention of bad faith is singularly unpersusaive. In support of its claims of bad faith, the Church points to past and present civil litigation between the Church and the Government, Government memoranda allegedly containing libelous mistatements, and alleged continuous governmental investigations into the Church's activities. Such evidence is depicted by the Church as evidence of the Government's hostile animus toward it. The evidence produced by petitioner fails to establish even a prima facie showing of Government's bad faith in obtaining the warrants here in question. These general allegations of bad faith, even if true, do not, however, establish that the government acted in bad faith in securing the warrants and executing the search in this case. Although petitioner charges a massive seizure beyond the scope of the warrant, this contention has not been proved and remains the sub-

ject of a later hearing. To date, petitioner has failed to demonstrate anything illegal, or even improper, in the securing and executing of the warrant.

Perhaps aware of this conspicious omission of some demonstration of "bad faith" in the issuance or execution of the warrant, the Church points to the affidavit of Ian Shillington who testified that during the search of Church premises he overheard an unidentified F.B.I. agent instruct other agents that the "cover" story for the search was the alleged stolen government documents but the real target was evidence or documents of the Church relating to "the F.B.I., the AMA, the FDA, and the BBB."

The Court finds this uncorroborated self-serving statement subject to considerable question. In the face of the evidence of a legitimate search, pursuant to a bona fide warrant, the Court does not find that a prima facie showing of bad faith has been made.

Moreover, the Church has failed to demonstrate that the motive or "bad faith" of the prosecutor or F.B.I. agents is a ground for invalidation of a validly issued warrant. The "well established case law," cited by petitioner, is not on point. The principal cases cited to the Court involve the issuance of a subpoena, not a warrant. In addition, these cases all stem from civil investigations, where there is no requirement of a finding by a "neutral and detached magistrate" of probable cause for the issuance of subpoena. Johnson v. United, 333 U.S. at 13. Here, unlike the traditional civil subpoena, the warrants were reviewed and issued by a magistrate. The different burdens of persuasion with respect to subpoenas and warrants issued respectively, in civil and criminal proceedings make the cases cited inappropriate.

Furthermore, the moral culpability, or wilfulness of the prosecutor and his

agent, be it legitimate or otherwise, would appear to be largely irrelevant. See United States v. Agurs, 96 S.Ct. 2392, 2400 (1976). If the seized documents were within the scope of the warrant, and if it was otherwise proper, then the motive or animus of the prosecutor is not an important consideration in determining the validity of the warrant. On the other hand, if the agents seized documents not within the terms of the warrant, or otherwise acted improperly, then, irrespective of the prosecutor's motive, the improperly seized material must be returned. United States v. Daniels, 549 F.2d 665 (9th Cir. 1977). In short, our inquiry in the criminal law would appear to be narrow: (1) whether the warrant was properly issued, and (2) whether the material seized was within the terms of the warrant. The focus is on the acts, not the motives.[10/] In sum, the Church has initially failed to demonstrate the existence of bad faith in the

securing of the warrant, and secondly, even assuming there was some evidence of bad faith, the Church has not established that it would be a ground for invalidation of the warrant.

V. Section 3109

Petitioner next contends that, in executing the warrant at both Cedars-Sinai and Fifield Manor, the F.B.I. agents violated Section 3109,[11/] which prohibits forced entry except when an officer is refused admission after announcing his authority and purpose. United States v. Daniels, supra. Petitioner asserts that "[t]he facts in this case demonstrate an overzealous execution of search warrants which resulted in the wholly unnecessary and uncalled for destruction and mutilation of the Church's property by F.B.I. agents acting in total disregard of the statutory pre-requisite to forcible entry under §3109." Petitioner's Trial Brief at 32. The crux of the

Church's argument is that the F.B.I. agents, having gained initial entry, failed to afford Church personnel an adequate opportunity to provide keys and combination to various locked inner doors and filing cabinets. Absent a "refused admittance" or "exigent circumstances," the F.B.I. agents' use of force is said to have been improper.

The facts belie petitioner's contention. The affidavits and the testimony introduced at the hearing reveal that the agents executed the warrant in a proper manner. After securing the premises to assure that evidence would not be destroyed, the agents gave the Church members a substantial period of time to locate persons who could open the locked doors and cabinets. When the initial deadlines were not met, the agents extended the time deadlines. Only after a protracted delay in an unsucessful effort to obtain cooperation from Church officials did the F.B.I. agents use force to obtain

access to the area to be searched. The failure by Church personnel to open locked inner doors and filing cabinets, after being given a substantial period in which to locate keys and combinations, constitutes a "refused admittance." Accordingly, the Court finds that the limited use of force to obtain access was fully justified.

Petitioner also contends that the F.B.I. agents violated Section 3109 by breaking the lock securing a gate upon an exterior fence at the Cedars-Sinai premises prior to awaiting cooperation from Church personnel. Again, however, the facts belie petitioner's contention. The evidence, including the Court's interpretation of the testimony of petitioner's own witness, reveals that the F.B.I. agents initially sought entrance by ringing a bell on the gate. After a period of waiting at the gate with no response, a watchman began walking toward the gate, abruptly stopped,

F.B.I. agents violated Section 41(d) of the Federal Rules of Criminal Procedure by failing: (1) to permit representatives of the Church to be present during the making of the inventory, and (2) to leave a complete inventory of the property seized. Both contentions advanced by the petitioner must be rejected.

In pertinent part, Rule 41(d) provides:

> "The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from

and turned toward the main building. At this point, the agents clipped the lock on the gate. The agents testified that they were concerned that the watchman would activate an alarm and that the evidence would be destroyed. Under these circumstances, the Court finds that cutting the lock was fully justified both by the existence of exigent circumstances and a "refused admittance."

Therefore, from all the evidence presented, the Court finds that the F.B.I. agents executing the warrant scrupulously complied with the requirements of Section 3109 which permits the limited use of force only when refused admittance. There is no evidence of the excessive use of force by the agents in executing the warrant. Accordingly, petitioner's objection to the search founded upon Section 3109 is without merit.

VI. Fed.R.Crim.P. 41(d)

The Church next contends that the

> whose possession or premises the property was taken and shall be verified by the officer . . . . "

As petitioner concedes, violations of Rule 41(d) have frequently been characterized as ministerial where the flaw consisted of the failure to file and return the inventory with the court. See, e.g., United States v. Hall, 505 F.2d 961 (3rd Cir. 1974) (and cases cited therein). Recognizing this obstacle, petitioner seeks to fit this case within the exceptional situations recognized in United States v. Burke, 517 F.2d 377 (2d Cir. 1975). In that case the Court adopted the following rule:

> "Without assuming to make a definitive formulation, we think that . . . violations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of the deliberate disregard of a provision in the Rule."

517 F.2d at 386.387. Accord, United States v. Dudek, 530 F.2d 684 (6th Cir. 1976). Assuming arguendo that a violation of Rule 41(d) which met the Burke test would justify return of seized property under Rule 41(e), the Court finds that petitioner has failed to establish anything more serious than a ministerial omission.

Petitioner's first contention, that Church members were excluded while the F.B.I. agents conducted the search and made the inventory, is without foundation. The evidence presented at the hearing revealed that Church members were permitted to observe, and did observe, the F.B.I. agents conducting the search and seizure. To support its contention, petitioner refers the Court to the F.B.I. agents' direction of a group of twenty maintenance personnel to leave a room which was being searched. The uncontra-

dicted testimony of the agents, however, was that the maintenance staff was sweeping the room and thereby interfering with the orderly searching. This certainly does not amount to an improper exclusion of Church personnel from the premises while the search was being conducted.

As to the contention that the officers failed to provide an inventory, again the facts slay petitioner's theory. The evidence presented reveals that the F.B.I. agents originally compiled and left with Church personnel a 453 page inventory of the items seized at the Cedars-Sinai complex. Thereafter, the agents discovered that inadvertantly 14 pages had been omitted. The omitted fourteen pages were then added, and petitioner was furnished with an amended 467 page inventory. This certainly does not amount to anything more serious than an inadvertant "ministerial" omission.

Petitioner has, therefore, completely failed to demonstrate a violation of Rule

41(d) rising to the constitutional propostions as defined by United States v. Burke, supra. Petitioner's motion for the return of property grounded upon Rule 41(d) must be rejected.

VII. Accompanying Affidavit

Petitioner next contends that the search and seizure was improper because each of the F.B.I. agents did not carry the affidavit of Agent Tittle with them as they executed the warrant and because the copy of the warrant furnished Church representatives did not include a copy of the affidavit. Petitioner concedes that there is no statutory requirement or even an administrative regulation requiring that the affidavit upon which the warrant was issued be present at the scene of the search. Petitioner nonetheless argues that the affidavit was necessary in this case because, absent the affidavit, the warrant was unconstitutionally "general." Item 162 in the

warrant originally held to make the warrant a "general warrant" by Judge Bryant, was later held by the Court of Appeals for the District of Columbia to be proper because Item 162 included a limiting reference to the Affidavit of Agent Tittle. Petitioner contends that in the absence of the accompanying affidavit, the warrant in the hands of the executive agents reverted to the general warrant held to be constitutionally infirm by Judge Bryant.

Initially, the Court notes that there is no requirement that the affidavit upon which the warrant was issued be present at the search. However, the Court finds that the affidavit was in the possession of an F.B.I. agent present during the searches and seizures of both premises. The presence of the affidavit at both of the premises which furnished the requisite guidlines to the officers conducting the search, negates the argument of the Church.

Moreover, even without the presence of the affidavit, Item 162 by itself furnishes adequate guidance to the officers for their proper conduct of the search. Item 162 reads:

> "Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and the theft of government property in violation of 18 U.S.C. §§371, 1503, and 641 which the facts recited in the accompanying affidavit make out."

(Emphasis Added.) The limiting language of the item, highlighted above, carefully delimited the items to be seized with sufficient presicion to guide the agents in the conduct of their search. In light of the other 161 items listed in the warrant, there can be no doubt that the proper scope of the search was delineated by the warrant.

VII. Calandra

Although one issue raised by peti-

tioner remains for future consideration by the Court, the Government maintains that it is presently entitled to the possession and use of the seized material for presentation to the grand jury. In support of this proposition, the Government cites United States v. Calandra, 414 U.S. 338 (1973). Petitioner strenuously objects to the use of seized documents by the Government prior to the resolution of the remaining issues raised by its Rule 41(e) motion. For the reasons that follow, the Court believes that the Government is entitled to the immediate use of the items designated in the warrant by the numbers 1-161.

Resolution of the Government's motion for the use of the seized material prior to the completion of the 41(e) proceedings requires a thorough consideration of United States v. Calandra, supra. The issue in Calandra was "whether a witness summoned to appear and testify before a grand jury may refuse to answer questions

with a considerable exegesis on the historical role of the grand jury. The Court then analyzed the question presented as whether the exclusionary rule should be extended to grand jury proceedings. 414 U.S. at 349. Adopting a balancing approach, the Court weighed the potential injury to the historic role and function of the grand jury against the potential benefits of the rule as applied in this context. Id. The Court then declined to "embrace a view that would achieve a speculative and undoubtedly minimal advance in deterrence of police misconduct at the expense of substantially impeding the role of the grand jury." 419 U.S. at 351-352. Expanding on its conclusion, the Court stated:

> "Our conclusion necessarily controls both the evidence seized during the course of an unlawful search and seizure and any question or evidence derived therefrom (the fruits of the unlawful search). The same considerations of logic and policy apply to both the fruits of an un-

on the ground that they are based upon an unlawful search and seizure." 414 U.S. 339. The issue arose in Calandra as a result of the discovery of evidence of possible loan sharking activity in the course of an unsuccessful search for gambling paraphenalia at Calandra's business premises. After a substantial delay, Calandra was called to testify before a grand jury investigating loan sharking activity but he refused to answer questions on the basis of the Fifth Amendment. After being granted transactional immunity, Calandra sought and obtained a postponement to permit the institution of a Rule 41(e) proceeding to challenge the eivdence seized in the search. The Court then granted Calandra's Rule 41(e) motion to suppress the evidence seized, and further ordered that Calandra need not answer any of the grand jury's question based upon the illegally seized evidence.

The Supreme Court began its analysis

> lawful search and siezure and derivative use of that evidence, and we do not distinguish between them."

414 U.S. at 354-5.

To avoid the express holding of Calandra, the petitioner argues that this case presents a unique abuse recognized and reserved in Calandra. Referring to the extension of the exclusionary rule to grand jury proceedings, the Court stated:

> "Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained."

414 U.S. at 351 (Emphasis Added.) Peti-

tioner maintains that this case presents the situation of the seizure of material solely to obtain an indictment, with no intention of obtaining a criminal conviction.

The Court must reject petitioner's argument. In the first place, there has been no showing whatsoever that the documents were seized for any purpose other than obtaining a criminal conviction. Moreover, petitioner's argument glibly assumes as a premise that the documents were illegally seized. To date, there has been no such showing.

In anticipation of the argument that the documents have not yet been shown to have been illegally seized petitioner has argued that until the Rule 41(e) proceedings are completed, the legality of the search has not been adjudicated in its entirety. The Government, in response, argues that under Calandra it is entitled to present the seized material to the grand jury irrespective of the legality

of the search. Accordingly, the Government argues that it need not await termination of the Rule 41(e) proceedings.

Taken in its logical limits, the Government's reading of Calandra would substantially eviscerate Fed.R.Crim.P. 41(e). Under the Government's interpretation, Calandra entitles the Government to present to a grand jury material previously held in a Rule 41(e) to have been illegally seized. The Government's position would, of course, have entitled it to immediate possession and use before the grand jury of all the seized material even after Judge Bryant had found the warrant unconstitutionally general. However, whether Calandra's concept reaches this far need not be resolved.

At the very least, Calandra stands for the proposition that a grand jury investigation into allegations of criminal conduct shall not be impeded by protracted litigation over the legality of underlying searches and seizures. In this case, the

Court finds that the Rule 41(e) litigation over the legality of the searches and seizures has already substantially delayed the grand jury's investigation. The relevant grand jury, known as Possible Violations of 18 U.S.C. §§371,641, 1503, was impaneled in October, 1976 and began taking testimony and evidence in this matter in December, 1976. For almost eight months, the grand jury's investigation has been stymied by the "minitrials and preliminary showings," condemned in Calandra, 414 U.S. at 350 (quoting from United States v. Dionisio, 410, U.S. 1, 17 (1973). Unnecessary further delays are unacceptable.

To date, the Court has determined that none of petitioner's objections to the issuance of the warrant and its execution are valid. Moreover, even assuming that petitioner's remaining contention is correct that items seized exceeded those described in the warrant, the legal remedy would appear to be re-

turn and suppression of the illegally seized items. United States v. Daniels, 549 F.2d 665 (9th Cir. 1977). In Daniels, the Court held:

> "The exclusionary rule does not require the suppression of otherwise legal seizures merely because they were part of the same search in which an illegal seizures occurred. See United States v. Artieri, 491 F.2d 440, 445-46 (2d Cir.), cert. denied, 419 U.S. 878, 95 S.Ct. 142, 42 L.Ed. 2d 118 (1974); United States v. Holmes, 452 F.2d 249, 259 (7th Cir. 1971), cert. denied, 405 U.S. 1016, 92 S.Ct. 1291, 31 L.Ed.2d 479 (1972). Wong Sun v. United States, 371 U.S. 471, 484-87, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), requires the suppression of the 'products' of illegal seizures; the evidence, other than the letters, seized here was the 'product' of a valid search, not an illegal seizure, Wong Sun's 'taint' reaches items derived from unconstitutional behavior, not items derived from constitutional behavior even when contemporaneous with that which is unconstitutional. To permit it to reach such items would be to worship a metaphor and to defile reason."

549 F.2d at 668. See also, Andresen v. Maryland, supra, 96 S.Ct. at 2747 (seizure and later return of numerous improperly seized items).

In view of the equitable nature of a Rule 41(e) proceeding, Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974) cert. denied, 420 U.S. 927 (1975), the Court has concluded that the Government may immediately use and present to the grand jury the documents described in Items 1-161 of the warrant.

ACCORDINGLY, IT IS THEREFORE ORDERED THAT:

1. The Clerk of the Court shall return to the United States Attorney's Office all documents and materials which the Court had previously ordered placed in the custody of the Clerk. Orders of August 8, 1977 and August 24, 1977.

2. The United States Attorney's Office is directed to store the seized material in a safe and secure place with access limited solely to the United States

Attorneys in Los Angeles and Washington and Assistant United States Attorneys who are handling this action and the related action in Washington, D. C.

3. The Assistant United States Attorneys who are handling this action and the related action in Washington, D. C. may, in their discretion, permit access to the following persons, provided that they assure that the security and confidentiality of the documents will not be compromised:

A. Staff personnel - including secretaries and paralegals.

B. F.B.I. agents

4. Until further order of this Court, the Government may use, solely for presentation to the Grand Jury, those documents described in the warrant by the numbers 1-161.

5. The Assistant United States Attorneys and their nominees (as described in §§2 and 3, supra) may not disseminate the seized material to any other

agency, institution, or individual(s) other than as authorized in paragraphs 2, 3 and 4, supra.

6. The Government may not make any other use of the documents except as authorized in paragraph 4, supra.

IT IS SO ORDERED.

IT IF FURTHER ORDERED that the Clerk shall serve personally counsel of record.

Dated: April 4, 1978

Malcolm M. Lucas
United States District Judge

FOOTNOTES

1/ Rule 41(e) actions must be dismissed unless the moving party makes a showing of irreparable injury unless granted the relief requested. Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974), cert. denied 420 U.S. 927 (1975) cited with approval in G.M. Leasing Corp. v. United States, ___U.S.___, 97 S.Ct. 619 (1977). See also Order Re F.B.I. Internal Memoranda, dated September 9, 1977. The Court finds that the Church has made the requisite showing of irreparable injury in this case. For instance, the Church's First Amendment contentions, if valid, would seem to mandate the immediate return of the documents.

2/ The Cedars-Sinai Complex located at 4883 Fountain Avenue, Los Angeles, California, was formerly used as a

hospital and occupies approximately a city block.

3/ The Fifield Manor, located at 5930 West Franklin Avenue, Hollywood, California was formerly a hotel, and is presently used by the Church both as a business office and as living quarters.

4/ The propriety of the search in the District of Columbia is, of course, not before this Court.

5/ For purposes of textual clarity, this opinion will hereinafter refer to the searches and seizures at the Cedars-Sinai Complex and Fifield Manor in the singular as the "search and seizure."

6/ The history of this case is also reviewed in this Court's Order re F.B.I. Internal Memoranda, dated September

9, 1977.

7/ When the parties notified the Court by telephone of their mutual desire to continue the hearing on this issue, the Court informed both parties that a continuance of the hearing on this issue might well present the question of the interim availability of the documents for use by the grand jury prior to hearing and a determination of this remaining issue. The Court informed the parties that approval of the stipulation was conditioned upon this recognition of this point, and the stipulation submitted by the parties and approved by the Court so reflects.

8/ The alleged illegality of the search warrant predicted upon the First Amendment may well be barred by the principle of collateral estippel. In holding the warrant was impermissably general, Judge Bryant noted that the

search in this case was directed at a religious organization. Memorandum and Order at 16. In reversing Judge Bryant's decision, The Court of Appeals for the District of Columbia did not expressly address the issues. The Per Curiam Opinion by the Court of Appeals, which states that it has considered the facial validity of the warrant, can certainly be read as direct repudiation of this First Amendment argument. Because of the ambiguity concerning what was expressly decided by the Court of Appeals regarding the First Amendment issues raised, the Court will expressly consider this issue anew.

9/ This ruling refers only to the allegations of "bad faith" in the procurement of the search warrant. The Court reservds the issue as to alleged "bad faith" in the execution of the warrant until the hearing on the legality of the scope of the

search.

10/ Petitioner has not made any argument to the Court that the search was conducted in a manner that denied the Church due process of law. The Court is, of course, mindful of the Supreme Court's admonition in Agurs, supra, That "though the attorney for the soverign must prosecute the accused with correctness and vigor, he must always be faithful to his client's overriding interest 'that justice shall be done.' He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocent suffer.'" 96 S.Ct. at 2401. The evidence presented to the Court to date does not, however, suggest any breach of elementary fairness in this case.

11/ "The officer may break open any outer or inner door or window of a house,

or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." 18 U.S.C.A. §3109.

APPENDIX G

OPINION of the DISTRICT COURT for the DISTRICT of COLUMBIA in

In re Search Warrant

Dated July 4, 1977
(August 24, 1979)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

IN RE: Search Warrant Dated July 4, 1977 for Premises Located at 2125 S Street, Northwest Washington, D. C. :

Misc. No. 77-0151

MEMORANDUM AND ORDER

On July 8, 1977 agents of the Federal Bureau of Investigation conducted a search of the Washington offices of the Founding Church of Scientology pursuant to a warrant which instructed them to search for numerous documents and evidence of

conspiracy, obstruction of justice and theft of government property in violation of 18 U.S.C. §§ 371, 1503 and 641. The Church sought return of the property and a protective order against the government's use of the documents seized. The United States Court of Appeals for the District of Columbia reversed this court's ruling of July 27, 1977, that the warrant in this case was a general warrant in violation of the Fourth Amendment.

The Court remanded this action to this court to decide several issues which remained open:

> that the search was conducted in a manner that constituted a violation of the Fourth Amendment, that the agents employed unnecessary force in violation of 18 U.S.C. 3109; and the warrant was stale. [In Re: Search Warrant Dated July 4, 1977, 572. F.2d 321, 328 (D.C. Cir. 1977).]

At the hearing on these remaining contentions, some of the agents who

participated in the search for and seizure of the documents gave vivid accounts of (1) the authority under which they seized documents they took from the Church offices; and (2) the manner in which they conducted their seizure, i.e., whether the documents were taken deliberately or by accident.

At about 8:45 a.m., twenty-five F.B.I. agents appeared at the Church premises. Entry was forced to rooms on the fourth floor which contained the Church files, and about fifteen of the agents sifted through documents until 7:00 p.m., a total of ten hours.

The warrant listed as items to be seized 148 specific documents and files allegedly stolen from government offices, a summary of certain grand jury testimony and twelve other documents and categories of documents believed to be evidence of alleged conspiracies. In addition, item number 162 authorized seizure of "any and all fruits, instrumentalities and evidence (at this time

unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [sic] in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out."

Three agents who testified about their seizure of documents said they took documents under one of the more specific headings of the warrant (items 1 through 161); under the less specific item 162 which authorized the agents to seize "[a]ny and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice, and theft of government porperty [sic] in violation of 18 U.S. Code 371, 1503 and 641 which facts recited in the accompanying affidavit make out"; or under the "plain view" doctrine. They also gave several explanations of how they decided to seize documents which did not fit within one of the specific categories listed on the warrant. For example, Agent J. F.

Higgins said:

> [F]or instance, we were told to try to get guardian orders -- relating to guardian order 1634 -- well, if I saw a compliance report to that guardian order, to my understanding of the crimes alleged, that seemed to establish a relationship to the item described in the generalized kind of description of an item that would be pertinent -- [Tr. 216.]

At another point Higgins explained:

> Well Your Honor, the items that I was having a little bit of question with were the items that were labelled Snow White or something of that nature. Then I would look into the -- I would read the document over, and if it was something of that nature and there was a word in there that more or less, or a couple of words, or a phrase or a paragraph in there that indicated that that particular Snow White document pertained to what would be characterized as overt [sic] activity, I would take it. [Tr. 220.]

Higgins explained more fully later on:

> [W]hen I saw items that related to Snow White, I was working under the presumption that we were seeking evidence of criminal conduct, when Snow White is described in that affidavit as main program directed against governmental agencies -- which means the main things that were not quite on the up and up . . . Because as I went over each document I read, understanding the violations that were being alleged, and I sought to see whether or not Snow White - that particular document that had Snow White on it -- meant or related to activities which would have appeared to be criminal. [Tr. 224-225.]

Agent Joel Dean explained why he seized a pleading filed in a legal suit brought by Gregory Taylor. (He testified that he took the document under Item 162 of the warrant.)

> The reason I chose this particular item to take during the search was that Gregory

> Taylor was present upon entering the Fourth Floor rear of the Scientology. He was an individual who had access to that location. He was an individual, who I think -- as I remember, I guess it was IRS had arrested him, mistaking that he was a Mr. Wolff.
>
> This, indeed, showed that the Church of Scientology had an interest in him. . . . The fact that he was on the premises in the area that secured papers were located, and that the church had an interest in him as an individual, it was my estimation that he could certainly have been a participant in the church's plan to obstruct justice in regard to the theft of Government property. [Tr. 279.]

Dean also testified that a number of documents were seized under the plain view doctrine.

> Computer Number 50287. This is a document pertaining to codes. I seized it under the plain-view doctrine. . . . It's a listing of codes -- codes for different terms, names, and words. . . . I'm telling you that the reason

this was seized is because it would be a valuable key into the entire 161 items to understand them in their entirety.

THE COURT: So you chose that item, not on the basis of anything in the list, but on the basis -- Well, you fancied it to be important?

THE WITNESS: It's a listing of codes, and knowing the other 161 items could have codes, and after reading this, I selected this and seized this so we could interpret the other items that were seized in regard to the affidavit. [Tr. 323-325.]

Dean said that he had seized 14 of the inventoried documents as a package of codes under the plain view doctrine. Tr. 339.

Agent Charles Booth testified about his seizure of a document which was labeled with a large "SW" on the top and which he took according to items 152, 155 and 156 of the warrant.

It has got "SW" on the top of it, I think. . . . That to me meant "Snow White" . . . and which was listed in the search warrant, it says, "Utilize BI for help in leads for discovery." "BI" meant to me, the Bureau of Information . . . of the Church of Scientology. Which I construed to mean that the Scientologists were attempting to put a source within the FBI to obtain any information that they couldn't get or did not get under the Freedom of Information. . . . But it would fall under the category of the operation that the Scientologists have utilized, I believe. I believe it is Guardian Order 1361. [Tr. 504-505.]

A survey of the inventory of items seized by the F.B.I. agents reveals that these selection procedures led to the seizure of several hundred documents - nearly half or more of the seizure -- which were not designated by the warrant; and by no stretch of the imagination could they be regarded as within the

designated categories of documents to be seized. In effect the agents conducted a general seizure. The determination as to what items were relevant to the warrant was subsequently made by the prosecutors at a more leisurely pace after the seized documents had been transferred to their office.

The government has decided to return the "innocuous" items voluntarily. One of its representatives claims, however, that these items are merely cumulative, and that their return says nothing about whether the documents are in fact evidence of crime. I find this explanation patently incredible and unworthy of belief. This, especially in light of the fact that other members of the United States Attorney's office have represented to the court that fully half of the documents which were seized were innocuous, meaning they held no criminal connotation.[1/]

But in any event the contention is made that the recognized adequate remedy

for such an illegal seizure is the voluntary return of the items deemed worthless to the prosecution's cause. Cited as authority for this proposition is United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977), which in turn directs attention to Justice Blackmun's observations set out in footnote 11 of the Court's opinion in Andresen v. Maryland, 427 U.S. 463, 482 (1976), as support for this view. However, I do not believe that the Court in Andresen intended to condone as a practice (a) the wholesale seizure and carting away of documents by officers who willfully exceed the scope of their authority under a warrant, and thus violate the law;[2/] (b) a more leisurely screening and selection of those which are relevant by prosecutors in their offices; and then (c) the voluntary return of unwanted items. If this were so, then the manifested concern that private papers be accorded the fullest possible Fourth Amendment protection is meaningless. I think it significant

conducted in a manner that minimizes unwarranted intrusions.

In 1968 when Congress authorized the surreptitious interception of wire communications it at the same time recognized the deep intrusiveness of wiretapping and electronic surveillance upon individuals' personal privacy. This concern is reflected in the enactment of 18 U.S.C. § 2518(5)(1970) which provides that any seizure of conversations "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."

It appears that the Fourth Amendment's requirement that warrants "particularly describe the place to be searched, and the persons or things to be seized" can fairly be equated to the wiretap statute's "minimization requirement." Central to the purpose of both is the protection of individual privacy from unreasonable infringement on the part of government. The only patent

in this regard that Justice Blackmun recognized the fact that: "In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." Andresen v. Maryland, 427 U.S. 463, 482 n.11 (emphasis added). This obviously does not imply accpetance of the proposition that it is certain that such innocuous documents will be seized and carried away after examination, cursory or otherwise, reveals that they are clearly not contemplated under the warrant.

As I read the same footnote in Andresen, the lower federal courts are admonished to be particularly sensitive to guarding against unwarranted encroachments on the constitutionally protected right of privacy involved in a document search. And it suggests a rational line of approach to the problem when it analogizes a document search to a wiretap, and cautioned that they should be

difference between the two provisions is that one (the Fourth Amendment requirement) is much more easily managed than the other. Compliance with the Amendment is a relatively simple task, requiring nothing more than curbing one's curiosity and adhering to the directions contained in the warrant.

The type of seizure here involved should be forcefully discouraged rather than condoned, and presents a prime target for the exclusionary rule. The Supreme Court stated the objectives of this sanction in succint terms in Stone v. Powell, 428 U.S. 465, 486 (1976):

> The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-Mapp decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or siezure, for and "[r]eparation comes too lact." Linkletter v. Walker, 381 U.S. 618, 637 (1965).

Instead,

> "the rule is a judicially created remedy designed to safefuard Fourth Amendment rights generally through its deterrent effect ..." United States v. Calandra, supra, at 348.

Obviously, the mere voluntary return of items deemed worthless by the prosecutor in no way serves the purpose of the exclusionary rule, and constitutes no sanction whatsoever. And if accepted as an adequate remedy in lieu of the suppression and return of the entire seizure, rather than having the effect of deterrence, it would instead constitute a breeding ground for more and more widespread abuse.

I do not believe there is any widespread tendency on the part of higher courts to accept such an empty jesture as adequate remedy for deliberate any unnecessary invasions of privacy in cases involving papers or wire communications,

although one circuit has in fact taken that view, United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), in a case involving the minimization clause of the wiretap statute. It is interesting to note, however, that the trial court in Sisca v. United States, 361 F. Supp. 735 (S.D.N.Y. 1973) rejected defendant's contention that incriminating communications should be suppressed on account of the failure to minimize. The motion was denied on two grounds. The court pointed out that it was denied as not timely filed under the terms of the statute' but then went on to decide that regardless of its untimeliness, the motion should be denied because suppression of the entire wiretap is not warranted by violation of the minimization requirement. However, in affirming on appeal the Second Circuit Court of Appeals specifically pointed out that its affirmance was based on the timeliness issue and not on the question of the appropriate remedy. 503 F.2d 1337.

Our own circuit, though hinting what its views might be, specifically avoided resolution of the issue. Scott v. United States, 436 U.S. 128, 135 n.10 (1978).

I think it should be pointed out that it is one thing to neglect taking the appropriate action to avoid the feared deep intrusion into one's privacy such as occurs in a wiretap with no effort to minimize. It is quite another, and much more egregious matter, when government agents engage in vigorous overt action which is specifically designed to subvert the protections which the Amendment seeks to afford, and which at the same time violates a specific statute enacted for the purpose of buttressing the specificity requirement of the Fourth Amendment.

I wish to emphasize that the quantity of innocuous documents seized, though significant in assessing the depth of the unlawful intrusion, is not the determining factor in my concluding that the

seizure is unreasonable. Rather, it is the stark fact that they were seized, in spite of the fact that they obviously were not included in any of the categories of items to be seized as contained in the warrant, and thus in flagrant violation of the statute (18 U.S.C. §2234) which is designed to bolster the effectiveness of the particularization requirement of the Fourth Amendment.

Accordingly, the court hereby holds that the United States illegally and unconstitutionally executed this warrant and converted their seizure of documents into a general exploratoy seizure in violation of the Fourth Amendment and of 18 U.S.C. §2234.

The court rules against petitioner on all other grounds.

Upon consideration of the above, the court ORDERS that the government, forthwith:

(1) return to petitioner all materi-

als seized on July 8, 1977 in a search of petitioner's S Street premises by agents of the Federal Bureau of Investigation under a July 4, 1977 warrant, except stolen items,

(2) destroy any and all copies of said items in its possession or control; and

(3) retrieve and destroy all copies of any materials so seized, which have been disseminated to any person outside the Fraud Section of the United States Attorney's Office.

And it further ORDERS

That any items seized during the course of this illegal search, be, and it is suppressed as evidence, and shall not be admissable at any hearing or trial.

_____
United States District Judge

Dated August 24, 1979

FOOTNOTES

1/ Assistant United States Attorney Brian Shaughnessey told this court on July 27, 1977:

> Your Honor, copies have been made of, I would say about 75 per cent of the two boxes of documents. That represents the fifty per cent approximately -- I don't know the exact percentage, but whatever percentage it was that was going to be retained, and those documents that were on closer examination found not to be relevant to the anticipated criminal proceedings were to be returned. [Tr. 7.]

Assistant United States Attorney Garey Stark stated in open court on August 12, 1977:

> I do recall, however, during that period of time when I was fairly intimately involved in the development of this investigation that a perusal, which took place as quickly as possible after the seizure of such seized documents was made by members of our office

> and the Federal Bureau of Investigation, and it was the judgment of the people making that perusal that -- I may be incorrect, but I think approximately 40 or 50 per cent of the items seized would fall into a category, which in the opinion of the prosecutors would not be used in any criminal investigation.
>
> THE COURT: That is what they call innocuous documents?
>
> MR. STARK: Innocuous or whatever adjectives are appropriate. I don't know. I see no reason why documents which fall into that category cannot be returned. [Tr. 3.]

2/ 18 U.S.C. § 2234 provides:

> Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned for not more than one year.

No. 79-529

Supreme Court, U. S.
FILED
JAN 4 1980
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In the Supreme Court of the United States

OCTOBER TERM, 1979

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 591 F. 2d 533.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on February 22, 1979. A petition for rehearing was denied on June 6, 1979 (Pet. App. 19a-20a). On August 24, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including October 1, 1979, and the petition was filed on September 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner could properly take an immediate appeal from the denial of its motion under Fed. R. Crim. P. 41(e) for the return of documents seized from it and the suppression of the documents as evidence, where the documents were being used in a criminal proceeding against various officials and employees of petitioner.

STATEMENT

1. On July 8, 1977, FBI agents, acting pursuant to federal search warrants, conducted searches of two offices of petitioner in Los Angeles, California, and seized documents relating to the crimes of conspiracy, theft of government property, and obstruction of justice as specified in the affidavits supporting the warrants. At the same time, FBI agents executed a virtually identical warrant to search the office of the Founding Church of Scientology in Washington, D.C. (Pet. App. 2a-3a, 24a-28a, 141a-142a).

On July 12, 1977, petitioner filed a motion under Fed. R. Crim. P. 41(e) for the return of documents seized in the Los Angeles searches and the suppression of the documents as evidence. A similar motion was filed by the Founding Church of Scientology with respect to the District of Columbia search (Pet. App. 3a).

By memorandum and order dated July 27, 1977, Judge Bryant of the United States District Court for the District of Columbia granted the Founding Church's motion, finding that the warrant was unconstitutional on its face. *In re Search Warrant dated July 4, 1977*, 436 F. Supp. 689. Because of "the identity of the parties to both proceedings and the nearly identical warrants in both seizures" (Pet. App. 86a), Judge Lucas of the United States District Court for the Central District of

California ruled that Judge Bryant's decision collaterally estopped the government from litigating the validity of the Los Angeles warrants; he therefore granted petitioner's Rule 41(e) motion (Pet. App. 30a, 86a). However, on the government's appeal from Judge Bryant's decision, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the warrant was facially proper. *In re Search Warrant dated July 4, 1977*, 572 F. 2d 321 (1977). This Court denied the Founding Church's petition for a writ of certiorari. 435 U.S. 925 (1978).

Thereafter, Judge Lucas granted the government's motion for reconsideration of his previous order (Pet. App. 31a). Following two days of evidentiary hearings (*id.* at 33a, 90a), Judge Lucas rejected petitioner's contentions that the Los Angeles warrants were invalid under the First and Fourth Amendments as well as the claim that the warrants had been executed in violation of 18 U.S.C. 3109 and Fed. R. Crim. P. 41(d) (*id.* at 33a-34a, 84a-140a). After additional evidentiary hearings, Judge Lucas also rejected petitioner's contention that the searches and seizures in Los Angeles had been conducted in violation of the Fourth Amendment (*id.* at 23a-83a). Accordingly, Judge Lucas denied petitioner's motion under Fed. R. Crim. P. 41(e) (*id.* at 21a-22a).

2. Invoking 28 U.S.C. 1291, petitioner appealed the denial of its Rule 41(e) motion to the United States Court of Appeals for the Ninth Circuit. While the appeal was pending, a federal grand jury in the District of Columbia indicted 11 officials and employees of petitioner on charges of conspiracy, obstruction of

justice, and theft of government property. Many of the documents seized in the Los Angeles searches were presented to the grand jury.[1]

The Ninth Circuit dismissed the appeal (Pet. App. 1a-16a), holding that, in the circumstances of this case, the denial of petitioner's Rule 41(e) motion was not an immediately appealable order. Finding that petitioner's motion sought not only the return of property but also the suppression of evidence in present criminal proceedings (*id.* at 4a, 14a), the court concluded that "ongoing criminal proceeding[s] * * *[would] be interrupted by * * * [petitioner's] appeal from an order denying suppression of evidence that may be used in [those] proceeding[s]" (*id.* at 13a-14a). Although acknowledging (*id.* at 16a) that "[t]here must, at some point, be a remedy available to [petitioner] for the return of its property, if it has been unlawfully taken," the court held that "the present appeal is not that remedy. We decide nothing more."

---

[1]Pursuant to a stipulation of evidence in the District of Columbia prosecution, nine of the 11 defendants were found guilty by Judge Richey on October 26, 1979. Seven defendants were convicted on Count XXIII of conspiracy to obstruct justice, to harbor a fugitive, and to make false declarations before a grand jury; one defendant was convicted on Count I of conspiracy to commit burglary, to steal government property, unlawfully to intercept oral communications, and to forge government credentials; and one defendant was convicted on Count XVII of the theft of government property. The remaining two defendants have recently been ordered extradited from England.

In connection with the District of Columbia prosecution, Judge Richey ruled that, with respect to documents seized from the defendants' offices and introduced in evidence against them, the execution of the Los Angeles warrants was not improper. See *United States* v. *Hubbard*, Cr. No. 78-0401 (D.D.C. Sept. 13, 1979). Some 200 documents seized during the Los Angeles searches were used as part of the stipulated record in the proceeding before Judge Richey.

ARGUMENT

Petitioner contends (Pet. 7-12) that, since it was not named as a defendant in the District of Columbia prosecution, it falls outside the rule of *DiBella* v. *United States*, 369 U.S. 121 (1962), that the denial of a motion under Fed. R. Crim. P. 41(e) is immediately appealable only if the motion is solely for the return of property and is not tied to a criminal prosecution *in esse*. At least in the circumstances of this case, however, the court of appeals correctly held that the district court's order denying petitioner's Rule 41(e) motion was not then appealable. Moreover, the court of appeals' decision does not conflict with the decisions of this Court or of the other courts of appeals. Finally, the question presented in the petition is not of practical significance in this case. Accordingly, review by this Court is unwarranted.

1. This Court has emphasized that the proper administration of the criminal justice system generally requires appellate review to await the entry of final judgment in the district court. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *DiBella* v. *United States*, *supra*, 369 U.S. at 124, 126, 129; *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940); cf. *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974). As the Court explained in *DiBella* (369 U.S. at 124, 126, 129) (footnote and citations omitted):

> This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.
>
> * * * * *
>
> Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

* * * * *

> To regard such a disjointed ruling on the admissibility of a potential item of evidence in a forthcoming trial as the termination of an independent proceeding, with full panoply of appeal and attendant stay, entails serious disruption to the conduct of a criminal trial.

See also *Cobbledick*, *supra*, 309 U.S. at 324-325. And "[a]s an instrument of * * * [a healthy legal system] the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding." *Cobbledick*, *supra*, 309 U.S. at 326.

The court of appeals correctly concluded (Pet. App. 13a-14a) that these considerations militated against allowing petitioner to pursue an immediate appeal from the denial of its Rule 41(e) motion. The concerns underlying the *DiBella* rule are not obviated by the fact that petitioner was not ultimately named as a defendant in the District of Columbia prosecution. Many of the documents at issue in petitioner's Rule 41(e) motion were presented to the District of Columbia grand jury that subsequently indicted 11 of petitioner's officials and employees; approximately 200 of these documents were included in the stipulated record before Judge Richey that served as the basis for the convictions of the defendants. Furthermore, these documents were and are being used both by other grand juries investigating petitioner and its officials and employees, and in proceedings to extradite from England two persons

already indicted by the District of Columbia grand jury. In these circumstances, the potential for petitioner to disrupt ongoing criminal proceedings is manifest.[2]

2. In addition, notwithstanding petitioner's assertion (Pet. 7), the court of appeals' decision does not conflict with the decisions of this Court or of the other courts of appeals. Petitioner relies principally on *United States* v. *Ryan*, *supra*. However, the Court in *Ryan* explained the controlling rule as follows (402 U.S. at 533):

> Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle [of finality]. We have thus indicated that review is available immediately of a denial of a motion for the return of

---

[2]We note (Pet. App. 4a-5a, 28a) that the government has supplied petitioner with two copies of each document seized, except for certain sensitive or confidential documents belonging to the government that petitioner is not entitled to have. See *In re Search Warrant dated July 4, 1977*, *supra*, 572 F. 2d at 327 n. 3. The government has also returned all copies of any of petitioner's documents that were ultimately determined not to bear on the criminal investigations. Thus, at this point "the principal purpose of [the Rule 41(e)] action is to determine whether the Government will be free to use the documents in possible future criminal proceedings" (Pet. App. 28a). However, with respect to the grand jury investigation, *United States* v. *Calandra*, 414 U.S. 338, 354 (1974), would seem to permit use of the documents regardless of the legality of the searches and seizures. In addition, *Calandra* also suggests that compliance with petitioner's Fourth Amendment rights is to be measured as of the time of the challenged search and seizure without regard to the government's subsequent use of the seized documents; application of the exclusionary rule to bar such use "presents a question, not of rights, but of remedies" (414 U.S. at 354). See also *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 555, 560 (1978) (government's interest in enforcing the criminal law and securing evidence is the same whether or not the third party subject to the search is culpable).

> seized property, where there is no criminal prosecution pending against the movant. See *DiBella* v. *United States*, *supra*, at 131-132. Denial of review in such circumstances would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession.

See also *Cobbledick*, *supra*, 309 U.S. at 324-325. The court of appeals' decision in this case did not "render impossible any review whatsoever," but rather held only that immediate appellate review was not available. Similarly, since a criminal prosecution involving the documents in dispute had been instituted against petitioner's officials and employees, the court of appeals' decision did not "mean that the Government could indefinitely retain [petitioner's] property without any opportunity" for appellate review.[3] Thus, the decision in this case is fully consistent with *Ryan*.

The court of appeals' decision is also consistent with the decisions of the only other two courts of appeals that, to our knowledge, have considered the issue. In *Application of United States*, 427 F. 2d 1140, 1141 (5th Cir. 1970), a group of appellants sought review of the denial of their Rule 41(e) motions; some of the appellants had been indicted, but the rest had not. *United States* v. *Glassman*, 533 F. 2d 262 (5th Cir. 1976). The court in *Application of United States* held that the district court's order was nonappealable even as to those appellants who were not yet under indictment. Similarly,

[3]Compare *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 15 (7th Cir. 1978) (neither movant nor any of its agents or employees had been charged in a criminal prosecution, and more than 17 months had elapsed since the seizure).

in *Parrish* v. *United States*, 376 F. 2d 601, 603 (4th Cir. 1967), the movants, a husband and wife, sought to appeal the denial of their Rule 41(e) motion; the husband was indicted, but the wife was not. The court of appeals held that neither movant could obtain immediate appellate review of the district court's order. Thus, in these cases, as in the instant one, the existence of a criminal proceeding in which the search-and-seizure issue could eventually be reviewed by the appellate court was found to foreclose the immediate appeal of the denial of a Rule 41(e) motion even by a person who was not a party to the criminal action.[4]

3. Finally, this case retains only limited practical significance. As discussed above (note 1, *supra*), Judge Richey has upheld the validity of the Los Angeles searches and seizures insofar as documents seized from the defendants during those searches were included in the

[4]None of the decisions on which petitioner relies (Pet. 7-12) is to the contrary. In *United States* v. *Williams*, 459 F. 2d 909 (6th Cir. 1972); *United States* v. *Alexander*, 428 F. 2d 1169 (8th Cir. 1970); *Coury* v. *United States*, 426 F. 2d 1354 (6th Cir. 1970); and *Gottone* v. *United States*, 345 F. 2d 165 (10th Cir. 1965), no criminal prosecutions in which the challenged evidence would be used were pending against either the person filing the Rule 41(e) motion or any other person. The court in *Shea* v. *Gabriel*, 520 F. 2d 879, 882 (1st Cir. 1975), expressly declined to reach the question whether it had jurisdiction to entertain an appeal from the denial of a Rule 41(e) motion where the movant was not the subject of a pending prosecution. In *United States* v. *Glassman*, *supra*, 533 F. 2d at 263; *Meier* v. *Keller*, 521 F. 2d 548, 556 (9th Cir. 1975); *Smith* v. *United States*, 377 F. 2d 739, 742 (3d Cir. 1967); and *Austin* v. *United States*, 353 F. 2d 512 (4th Cir. 1967), the courts held that the denial of the Rule 41(e) motion was nonappealable because of the existence of a pending criminal proceeding against the movant. Thus, none of the cases petitioner cites have upheld immediate appellate review of the denial of a Rule 41(e) motion that is tied to an ongoing criminal prosecution to which the movant is not a party.

stipulated record in the District of Columbia prosecution.[5] The defendants in that case have now been convicted and sentenced. The judgment of the district court is thus subject to appeal and the issue of the legality of the Los Angeles searches and seizures underlying the adduced documents will receive appellate scrutiny. In addition, petitioner has received copies of all seized documents to which it is lawfully entitled (see note 2, *supra*). And the copies of petitioner's documents retained by the government have already been used in the ongoing criminal proceedings and have recently been disclosed to the public pursuant to order of the district court in the District of Columbia. In these circumstances, little purpose would be served by this Court's consideration of the appealability of petitioner's motion under Rule 41(e) for the return of its documents and the suppression of the documents as evidence.[6]

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[5]The district court held that four of the defendants had standing to contest the Los Angeles searches and seizures with respect to documents taken from their offices and used at trial against them. In any event, and notwithstanding petitioner's fears of governmental abuses (Pet. 12), this Court has rejected the argument that additional Fourth Amendment protections are necessary in the area of third-party searches because of the unavailability of the exclusionary rule to deter misconduct. See *Zurcher* v. *Standard Daily*, 436 U.S. 547, 562-563 n.9 (1978) Moreover, although it was not indicted, any claim by petitioner of "third party" status in connection with the criminal investigation leading to the search of its premises would be spurious.

[6]Furthermore, beyond the issue of appealability, petitioner seems to assume that two courts of appeals—the District of Columbia Circuit and the Ninth Circuit—should simultaneously determine the legality of the very same searches and seizures. We submit, however, that only one appellate court should review the validity of the Los Angeless searches and seizures. As the Court said in *DiBella*, *supra*, (369 U.S. at 132, quoting *United States* v. *Lester*, 21 F.R.D. 30, 31 (S.D. N.Y. 1957), "[such a] course will avoid a needless duplication of effort by two courts and provide a more expeditious resolution of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the controversy * * *." In the circumstances of this case, deference should appropriately be given to the court reviewing the criminal convictions. The Court need not consider this issue to dispose of the petition; we note only that the appealability question is not the sole impediment to the appeal sought by petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-529

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The government fails to respond to the central question raised by this case: whether a party not subject to a criminal prosecution has a right to full judicial review, including appellate review, of the legality of the government's seizure of that party's private papers. The question does not involve the proper scope or application of the exclusionary rule.[1] Rather, it involves the fundamental

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[1] Thus the government's reliance on *United States* v. *Calandra*, 414 U.S. 338 is wholly inappropriate. *Calandra* held that the exclusionary rule does not apply to grand jury proceedings. It did not purport to hold that the *only* legal remedy for an unlawful search and seizure is the exclusion of the evidence at a criminal trial. Indeed, such a doctrine would put the cart before the horse. The core protection of the Fourth Amendment is to prevent improper intrusions by the government into privacy interests. *Katz* v. *United States*, 389 U.S. 347. *Calandra* itself makes clear that the exclusionary rule is applied as a protective device to discourage Fourth Amendment violations. It never was intended to be the *only* remedy for such violations. See *Bivens* v. *Six Unnamed Agents*, 403 U.S. 388.

rights of a party to obtain return of its private and privileged papers which were illegally seized.

United States v. *Ryan,* 402 U.S. 530, and the cases cited at pages 9-11 of the Petition, all stand for the proposition that a party not subject to criminal proceedings may litigate the issue of the legality of the seizure of its papers under Rule 41(e). The government's efforts to distinguish away the clear import of the cases by reference to the final judgment rule (Brief in Opposition at 5-6) or otherwise (*id.* at 8-9, and p. 4) are disingenuous. The final judgment rule applies in cases in which a party to ongoing litigation seeks appellate review of an *interlocutory* order. Here, the petitioner seeks appellate review of an order and judgment finally dismissing its Rule 41(e) motion and assessing costs against it. It is a party to no ongoing criminal litigation involving the documents at issue. The final judgment rule is no bar to its appeal.

Indeed, recent events in the criminal proceedings entitled *United States* v. *Hubbard, et al.,* 78-401 (D.D.C.) have highlighted the injury accruing to petitioner as a consequence of its inability to obtain appellate review of its Rule 41(e) motion. The nine defendants in the *Hubbard* case reached a plea disposition with the government by which they were tried before the Honorable Charles R. Richey, without a jury, upon a stipulated record of evidence. On October 26, 1979, the stipulated record was submitted to Judge Richey, and, in accordance with the plea disposition, he found each defendant guilty of a single count in the indictment. About 200 of the documents seized from petitioner during the searches in issue were made part of the stipulated record, prepared by the government, upon which the defendants were convicted.

On October 25, 1979, District Judge Richey *sua sponte* vacated the seal he had placed upon petitioner's documents

not voluntarily returned to petitioner by the government following their seizure, and released to the public and the press the approximately twenty to thirty thousand unreturned documents *not* made part of the stipulated record. The district court purported to justify its action by alluding to a "right-to-know" with respect to criminal proceedings:

> "[D]espite *dicta* in a recent Supreme Court case, this Court firmly believes that there is a right in the public to know what occurs before the courts." (Order, October 25, 1979)[2]

On October 29, 1979, petitioner filed in the district court a motion to intervene and to vacate the court's order of October 25, 1979, or, in the alternative, to stay the order pending the determination of the appeal therefrom. On November 1, 1979, the district court denied appellate's motion for leave to intervene, and on the same date commenced the release to the public and press of the thousands of petitioner's private documents which played no part in the criminal case, and the legality of whose seizure was still *sub judici* in the Ninth Circuit and in this Court.

Accordingly, petitioner has suffered and continues to suffer substantial intrusions into its privacy interests without an opportunity to obtain appellate review of the legality of the means by which the government obtained the documents. The fact that the government may have returned photocopies of the original documents to the petitioner (Brief in Opposition at 7, n.2) in no way less-

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[2] The district court was apparently referring to this Court's decision in *Gannett Co., Inc.* v. *De Pasquale,* 99 S.Ct. 2898 (July 2, 1979).

ens the substantial intrusion on petitioner's privacy rights.[3] In short, the history of this case demonstrates the compelling necessity for review of the court of appeals decision denying petitioner an appellate forum to raise its Fourth Amendment claims for return of its papers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] It is clear that a party aggrieved by an unlawful search and seizure is entitled to the return of both copies *and* the originals of its wrongfully taken documents. *Goodman* v. *United States*, 369 F.2d 166, 168 (9th Cir. 1966).